

ALAGAPPA UNIVERSITY

(Reaccredited with 'A' Grade by NAAC)
Karaikudi - 630 003, TAMILNADU



DIRECTORATE OF DISTANCE EDUCATION

(Recognized by Distance Education Council (DEC), New Delhi)

M.B.A
(Corporate Secretaryship)



Paper - 3.5 4.1

Company Secretarial Practice

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M.B.A. (Corporate Secretaryship)
(III Semester)



Paper-3.5
COMPANY SECRETARIAL PRACTICE

Paper 3.5: COMPANY SECRETARIAL PRACTICE

UNIT 1 : Incorporations And Conversion Of Companies

Procedure for incorporation of Private / Public Ltd. Companies - Commencement of business - Issue of certificate of incorporation and Commencement of business - Specimen resolutions.

UNIT 2 : Share Capital, Transfer And Transmission

Procedure for allotment of shares - Issue of share certificates and share warrants - Procedures relating to transfer of shares and transmission - Forfeiture of shares - Checklists and specimen resolutions.

UNIT 3 : Company Management

Procedures for the appointment - Re-appointment - Removal of directors including managing and whole-time directors, managers, company auditors and sole selling agents - Specimen resolutions.

UNIT 4 : Company Meetings

Calling and conducting meetings of Board, its committees, shareholders and others - Post meeting formalities including writing of minutes - Specimen notices and resolutions - Directors responsibility statement and compliance certificate.

UNIT 5 : Accounts and Audit

Preparation of Balance Sheet – Profit and Loss Account – Income and Expenditure statement – Auditor's report – Director's report – Maintenance of books of accounts – Statutory registers and returns.

UNIT 6 : Winding up

Procedures for various modes of winding up – Members and creditors voluntary winding up – Compulsory winding up by Court – Specimen resolutions.

REFERENCE BOOKS:

1. Tandon B.N, A Manual on Secretarial Practice.
2. Shanbhogue K.V, Company Law Procedures.
3. Ghosh P.K & Balachandran.V, Company Secretarial Practice.
4. Pattenshetti & Reddy P.R, Company Secretarial Practice.

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UNIT I

LESSON - 1

INCORPORATION OF A COMPANY

Objectives

After reading this unit, the students should be able to understand the Procedure for Incorporation of Private / Public Ltd. Companies, Commencement of Business, Issue of Certificate of Incorporation and Commencement of Business.

Lesson Outline

- Promotion
- Promoter's Legal Position
- Pre-incorporation Duties of the Secretary
- Incorporation or Registration of Company
- Certificate of incorporation
- Duties of the Secretary at the post incorporation Stage
- Incorporation of a Company
- Procedure to be followed by the Secretary for change of Name
- Secretarial Procedure for Alteration of Domicile Clause
- Secretarial Procedure for Alteration of Objects Clause
- Secretarial Procedure for the Alteration of Capital
- Procedure for reduction of capital by Special Resolution
- Procedure for alteration of Articles

Promotion

Promotion may be defined as the discovery of business opportunities and the subsequent Organisation of funds, property and managerial ability into a business concern for the purpose of making profit therefrom.

In this stage, an idea of forming a company is conceived by a person or a group of persons called Promoters. After preliminary investigation, they estimate

the possibilities of its success. They may even take the help of technical experts and procure their reports on the prospects of the project.

Promoter's Legal Position

Promoter's legal position is that he stands in a fiduciary relation to the company he promotes, and therefore he must not make secret profits. If he does make any secret profits he shall be accountable to the company. If he has defrauded the company, he shall be liable in damages. Although he is not an agent of the company, nor a trustee for it, he is accountable for all moneys secretly obtained by him from it, in the same manner as is an agent to his principal and a trustee to the beneficiary, because of his fiduciary position.

Pre-incorporation Duties of the Secretary

Prior to incorporation of a company, all the preliminaries are usually performed by the Promoters, and the secretary, who is engaged as pro temp officer, may be asked to assist the promoters in the preliminary work. He, however, performs this work in an unofficial capacity and it is only after the incorporation of the company that he comes on the scene officially. He may be asked to keep a record of the proceedings of the Preliminary meetings of the promoters and assist in the drafting of the various statutory documents required to be filed at the time of incorporation or registration of the company. For making arrangements incidental to incorporation of a company complete, the Secretary will seek the help of a solicitor or a Chartered Accountant fully conversant with formation procedure. The duties of a company secretary may be enumerated as follows :

(a) He helps the promoters in the discovery of the idea and making detailed investigations regarding the new venture.

(b) When the promoters make up their mind, the secretary helps them in preparing a financial plan.

(c) He ascertains from the Registrar of companies, if the proposed name of the company is available for registration

(d) He helps the promoters in deciding the situation of the registered office and its establishment.

(e) He help in the preparation of the draft Memorandum of Association. As the procedure for altering the clause of the memorandum is onerous and

lengthy, the secretary should be very careful about his duties in connection with the memorandum.

(f) It is his duty to convene a meeting of the promoters of the proposed company to consider the various aspects of company formation, such as drafting and printing of the memorandum and Articles payment of preliminary expenses; contracts with vendors and underwriters.

(g) It is his duty to help in the preparation of the draft of the Articles of Association.

(h) It is his duty to file certain other documents with the Registrar of companies. They are;

i. A declaration by an advocate of the Supreme or High Court or a Chartered Accountant or by a person named in the Articles as a director etc. that all the requirements of the Act and Rules there under have been complied with.

ii. A list as persons who have consented to become directors (in case of a public company) and their consent in writing to become as such and to purchase qualification shares.

(i) It is his duty to see that all the requirements of the Act as to incorporation and registration of the company have been complied with and to obtain the certificate of incorporation from the Registrar.

INCORPORATION OR REGISTRATION OF COMPANY

The promoters, i.e., the persons wishing to form a company by registration under the Companies Act select a few suitable names in order of preference and apply to the Registrar of Companies to ascertain as to which of the names is available for adoption. On hearing from the Registrar about the available name they will decide upon that name for the company. In the meantime, they would have decided the objects which the company is to carry out, the place where the business is to be carried on, the extent of the responsibility of each member for losses and the amount of the funds considered necessary to carry on the business properly. They will embody their decisions on these matters in a document called the Memorandum of Association, which must

be signed by seven persons, if the company is to be a public company and by two persons in case it is to be a private company.

These promoters will then arrange as to how the business is to be carried on for achieving the objects of the company, and frame rules and regulations for the company's internal management, which will be incorporated in a document known as Articles of Association.

These two documents duly signed and stamped with the requisite stamp duty will be delivered to the Registrar with necessary filing and registration fees.

The Registrar will retain and register these documents. But these two documents must als3 be accompanied by some others. A complete list of the documents to be filed is given below

(i). The Memorandum of Association.

(ii). The Articles of Association.

(iii). A Statement of nominal capital and when it exceeds Rs.50 lakhs a Certificate from the Controller of Capital issues.

(iv). Registrar's letter intimating about the availability of name.

(v). A Statutory declaration by an advocate, an attorney or pleader entitled to appear before a High Court or a Chartered Accountant practicing in India, who is engaged in the formation of the company, or by a director or any other officer of the company that all requirements of the Act and Rules hereunder in respect of registration have been complied with.

The above documents are all that are necessary for the incorporation or registration of a Private Company. In the case of a Public company, having a Share Capital there must be filed, IN ADDITION TO THE ABOVE the following documents.

(i). A duly signed list of persons who have consented to be directors of the company.

(ii). Written consent to act as directors signed by each director.

(iii). An undertaking in writing signed by each director to take from the company qualification shares, if any, and pays for them.

(iv). The address of the registered office of the company. (This has to be delivered in any case within 30 days of incorporation).

(v). Particulars regarding directors, manager and secretary, if any.

Certificate of Incorporation

When these documents have been filed with the Registrar and the necessary fees paid, the Registrar scrutinizes them. If he is satisfied everything in order, he will enter the name of the company on the register of companies maintained by him. In other words, he will register the company, then issue a certificate of incorporation under his signature in token of registration of the company on the date noted on it. This certificate serves the same purpose in case of a company which a birth certificate does in the case of natural person. On the registration, company comes into existence as a legal person distinct from members who constitute it.

The certificate of incorporation is conclusive evidence that all the requirements of the companies Act have been complied with and that everything is in order as regards registration end that the company has come into existence from the earliest moment of the day of incorporation stated therein, with rights and liabilities similar to a natural person competent to enter into contracts.

Duties of the Secretary at the Post Incorporation Stage

A private limited company may proceed to allot shares and commence business immediately after the certificate of incorporation. But a public limited company cannot make any allotment of shares and cannot commence the business until it has got the certificate of commencement of Business from the Registrar of companies. It is the duly of the secretary to take the necessary steps for obtaining the said certificate while preparing the memorandum of Association, the promoters, decide the nominal capital, its division into different kinds of shares and their denominations and the sources to be mobilized. When the public is to be invited to subscribe to the share capital of the company, then a prospectus is to be issued. The secretary proves very helpful in getting it prepared. The secretary should be very careful about the contents of the prospectus. He should call a meeting of the directors soon after the incorporation of the company and get the draft prospectus approved. In addition to according approval of the draft prospectus, the meeting transacts the following business;

elects a chairman; confirms the appointment of the Secretary; receives solicitor's report; appoints brokers, bankers, managing director or manager; approves underwriting agreement; approves a common seal and authorizes custody thereof approves agreements with vendors, etc.

Following is the list of other duties of the Secretary, at the post incorporation stage:

(1). To file with the Registrar of companies "Notice of situation of Registered Office", of the company if it was not filed at the time of registration of the company.

(2). He will have the name of the company painted or affixed in letters easily legible, and in a conspicuous position on the outside of every office or place of business of the company.

(3). He will have the name of the company engraved on its common seal

(4). He will have the necessary stationary printed with the company name and address on it.

(5). He will also keep the common seal under lock and key and maintain a seal Book.

(6). To file with the Registrar a prospectus or a statement in lieu of prospectus.

(7). If a prospectus is issued and minimum subscription is received then a meeting of the directors is to be convened to make allotment shares.

(8). To apply to the Registrar of companies for a certificate of shares.

As has been mentioned earlier, it is the duty of the company secretary to carryout day-to-day activities relating to the company. After the incorporation of the company, the first duty of the secretary is to organize his office. He should then distribute the work amongst the office personnel. He has to comply with the provisions of the Companies Act during the life time of the company. He attends to his office duties and supervises the work of his subordinates. He carries out the orders of the directors and implements the resolutions passed in the company meetings. He is under an obligation to maintain Statutory and Statistical books. He acts as an adviser to the directors and other officers of the company. He files periodical returns and statements with the Registrar of Companies. He has to see that the income-tax returns are filed with the income-lax officer regularly and

within the prescribed time. He calls company meetings and makes necessary arrangements for their holding. He takes down minutes of the meetings and sees to the implementation of the decision taken thereat. At the time of the liquidation of the company, he is under an obligation to help the liquidator in executing the liquidation work.

Appointment of Bankers

Generally, the promoters appoint bankers, solicitors, auditors and brokers of the company in advance. The appointments are confirmed by the Board of Directors in the first meeting. Generally such appointments are valid upto the first annual meeting of the shareholders when new appointments may be made or the earlier appointments renewed.

The appointment of bankers is a step precedent to the issue prospectus as share application money has got to be deposited with scheduled bank. A resolution has to be passed by the Board of Directors, regarding the opening of a bank account for the specific purpose of receipt of share application money. The Bank will issue receipts for the application money to the applicants. The current Account for regular transactions may be opened later on. The secretary has to present the following documents to the bank manager for opening a bank account:

(1). an application in the prescribed form for opening an account with bank

(2). Certain documents (i.e.) a copy of each Memorandum and Articles.

(3). Specimen signatures of the persons who will operate the account.

(4). A copy of the resolution of the Board of directors appointing the bankers as company bankers and

(5). Certificate of Incorporation for inspection by the banker.

The bank will thereafter open an account styled as for example "Omega Garments Limited share Application Account".

Conditions to commence business

A private company incorporated without share capital, may commence its business immediately it is incorporated. But a public company must obtain a certificate to commence business from the Registrar before it can commence

business. The Certificate to commence business will be granted by the Registrar only when the following conditions have been fulfilled by the company:

(a) the shares comprising the minimum subscription have been allotted;

(b) every director has taken up and paid for his qualification shares;

(c) a declaration verified by a director or the secretary stating clearly that;

   1. shares are allocated to an amount not less than the minimum subscription,

   2. directors have paid the application and allotment money due on their shares.

(d) either the prospectus or a statement in lieu of prospectus has been filed with Registrar.

If any company commences business or borrows money in contravention of this provision, every person responsible for the contravention is liable to a fine upto Rs. 500 for every day of contravention.

INCORPORATION OF A COMPANY

Preliminary Contracts: The formation of a company which is conceived of by one or more promoters may involve the acquisition of an existing business concern (a proprietary business, partnership firm or another company) or starting a new business. The acquisition of a going concern requires a preliminary contract to be signed by the promoters on the one hand and the vendors or the other. This contract must include full particulars of the properties and assets to be taken over by the new company, purchase price payable to the vendors, mode of payment and other terms and conditions relating to the deal (Seethe specimen given hereafter). If it is a new business to be run, promoters may have to purchase various assets, acquire land, arrange for the construction of factory and office premises, secure patent rights, place orders for the machinery and so on.

They have to enter into preliminary contracts for all such purposes so as to ensure that the necessary manufacturing and business facilities are available to the company after its formation. Outright purchase of properties and assets generally involve huge sums of money which promoters cannot afford to pay immediately, or even if they can afford to pay, they do not prefer to use their

funds immediately. Hence, they buy the option on those assets. In other words, they acquire the right to buy those assets at a stated price within a certain period paying in advance a relatively small amount known as "option money" The understanding is that the right to buy the assets will be exercised by the company after incorporation. If that is not done the option money is forfeited.

Specimen of a Preliminary Contract

The Agreement made on the Twenty-fifth day of August. One Thousand Nine Hundred and Seventy-four, between Shri B.M. Sheth, Managing Partner of Laiji Sheth & Company, II, Asaf Ali Road, New Delhi (herein after called the vendor), of the one part. and Shri R. R. Balns of 55, Friends Colony, New Delhi, on behalf of the company (which company is hereinafter referred to as the company) of tne other part. Whereas a Company to be called Modern Accessories Limited is to be formed under the Indian Companies Act, 1956, having for its object, inter-alia, the acquisition and working of manufacturing plants for the accessories. And whereas the nominal capital of the company is to be Rs. 5 lakhs divided into 50.000 Equity shares of Rs. 10 each. Now it is hereby agreed as follows:

[i] That the company shall immediately after its incorporation adopt this agreement.

[ii] The vendors shall sell and the company when incorporated shall purchase the Faridabad factory now belonging 10 Laiji Shesb & Company inclusive of land, buildings, plant and equipment, stores, supplies and inventories.

[iii] The consideration for the said sale shall be the sum of Rs. 2 lakhs payable as to Rs. 1-5 lakhs in fully paid, equity shares of the company and the balance in cash.

[iv] The title to the said properties shall commence with an indenties dated 8th October, 1974.

[v] The said properties are sold free from all encumbrances.

[vi] Completion shall take place on the 12th day of October, 1974, at the office of the Modern Accessories Limited.

[vii] If from any causes other than the vendor's wilful default completion shall not take place on the said 12th day of October, 1974, the

company shall pay interest on the unpaid purchase money at the rate of 6 percent per annum till completion.

[viii] Upon adoption of this Agreement by the company in a binding manner, the said Shri R. R. Bains shall be discharged from all liabilities in respect thereof.

[ix] Either party may be written notice determine this agreement if the company does not become entitled to commence on or before the 8th day of October. 1974.

[x] In case of determination of this Agreement under clause (9) here-of, no claim for damages, costs or expenses shall be made by either of the parties hereto.

(Signed) Virendra Lal

(Witness)

(Signed) B. M. Seth

Nand Kumar Jain

(Witness)

(Signed) R. R. Bains

MEMORANDUM OF ASSOCIATION

The Memorandum of Association sets out the constitution of the company; it is, so to speak, the charter of the company, and provides the foundation on which the structure of the company is built. The importance of the Memorandum lies in the fact that it defines the scope of the company's activities as well as its relation with the outside world. Its purpose is to enable the shareholders, creditors and those who deal with the company to know what is its permitted range of enterprise.

The Memorandum of Association must be (a) printed (b) divided into paragraphs, numbered consecutively, and (c) signed by each subscriber (who shall add his address, description and occupation) in the presence of atleast one Witness who shall attest the signature and likewise add his address, description and occupation.

Alteration of Memorandum

Since it is a document of fundamental importance, the Memorandum of Association of a company cannot be altered easily. The Companies Act lays down that the matters contained in the Memorandum shall not be altered except in case, in the mode, and to the extent, for which express provision is made in the Act.

Alteration of Name Clause

A company may alter its name by passing a special resolution and with the approval of the Central Govt., in writing. However, if through inadvertense, a company is registered under a name similar to, or identical with, that of an existing company, the alteration can be effected by passing an ordinary resolution and with previous consent of the Central Government. Similarly, if the Central Government directs the company to change its name within 12 months of its registration with a new name, the company must do so within 3 months of that direction by passing an ordinary resolution and with the prior approval of the Central Government in writing. If the company makes default in complying with the direction, every officer who is in default is punishable with a fine upto Rs. 100 per day of the period of default (Sec. 22(2)).

Procedure to be followed by the Secretary for Change of Name

Before a change in the name is forwarded for approval of the Central Government, the Secretary should take the following steps:

(i) He should write to the Registrar of companies of the Stale in which the registered office of the company is situated enquiring whether the changed name is undesirable. The application should be accompanied by a fee of Rs 500/-. If the Registrar informs that the changed name is acceptable, it may be assumed that formal approval of the Central Government will also be obtained. The Registrar is required to inform the company ordinarily within 14 days of the receipt of application whether the proposed change is acceptable.

(ii) The approval of the Central Government should be obtained which is available as a matter of formality once the Registrar has informed that the changed name is acceptable. However, approval of the Central Government is not necessary if the change involves only the addition or deletion of the word "Private".

(iii) The new (changed) name acceptable to the Registrar must be adopted within a period of 3 months. A Board meeting must be held as soon as possible to recommend the changed name to members. The Board has to decide to convene an extra ordinary general meeting to pass a special resolution. At the Board Meeting, the directors should approve a circular letter to be addressed to the members giving reasons for the proposed change.

(iv) After the special resolution has been passed at the extraordinary general meeting, the Secretary should get copies of the special resolution signed toy the Chairman of the special resolution signed by the chairman of the meeting to be filed with the Registrar. This should be done within 30 days of the date of passing of the resolution.

The form of resolution is generally as follows :

Resolved

That approval of the Central Government having been obtained, the name of the company (Sahu & Co. Ltd) be changed into Sahu Raj & Co., Ltd ; and necessary alterations be made in the Memorandum and Articles of Association of the company.

On the filing of the special resolution, the Registrar makes the necessary change in the Register and issues a fresh certificate of incorporation with the changed name.

(v) The secretary should incorporate the change of name in the Memorandum and Articles of Association of the Company, and file altered copies of these documents with the Registrar within 3 months.

(vi) The Secretary should also arrange for the company's name to be changed outside the registered office and other premises and on all documents on which the name appears. It must be remembered that the change of name is effective only from the date of issue of the fresh certificate of incorporation.

(vii) He should order a new seal and get it approved by the Board of Directors.

(viii) Finally, he should notify all parties dealing with the company of the change of name.

Alteration of Domicile Clause

A company may change the place of its registered office from one state to another for one or more of the following purposes :

(a) to carry on its business more economically or more efficiently;

(b) to attain its main purpose by new or improved names ;

(c) to enlarge (or) change the local area of its operations ;

(d) to carry on some business which under existing -circumstances may conveniently (or) advantageously be combined with. the business of the company;

(e) to restrict or abandon any of the objects specified in the Memorandum;

(f) to sell or dispose of the whole, or any part of the undertaking, or any of the undertakings of the company ;

(g) to amalgamate with any other company or body of poisons (Sec. 17),

The procedure laid down in the Act for changing the location of a company's registered office is as follows :

(a) If a company intends to change the location of its registered office from one locality to anther of the same city or town. It can be effected by a resolution of the Board of Directors; there is no necessity to pass a resolution of the shareholders. The notice of such a change must be given to the Registrar within 30 days. A Public notice is also issued to communicate the change to shareholders and the general public.

(b) If it is intended to shift office from the place to another within the same state the change can be brought about by passing a special regulation and filing within a fortnight a typewritten or printed copy of the resolution with the Registrar. Notice of the new location must be given to the Registrar within 30 days after the office has been shifted.

(c) To shift its registered office from one state to another, the company must pass a special resolution and obtain confirmation of the change from the company Law Board. Before confirming the alteration, the company Law Board satisfies itself that sufficient notice has been given to all creditors and other persons whose interest may be affected by the alternation and they

have given their consent, and that every such person who objects to it has claim or debt discharged or secured. As regained by the Act, the Company Law Board also causes notice of the proposed change to be served on the Registrar and he is given an opportunity to appear before the Company Law Board and state his objections or suggestions, if any, with regard to the change.

The Company Law Board may then issue the confirmation order on such terms and conditions as it thinks fit. Within 3 months from the date of the confirmation, the company must file with the Registrar of each State a Certified copy of with one order along with a printed copy of the altered Memorandum. If the documents are not filed within the time allowed (which any be extended by the Company Law Board', the alteration and all proceedings connected by therewith will become void end inoperative. The Registrar or each State registrar certifies the change. Then the Registrar of the other state from which the office is shifted sends to the Registrar of the other state all the documents relating to the company. Within 30 days of the change the company must give notice of the new location of its registered office to the Registrar of the State to which the office is shifted. Every copy of the memorandum issued thereafter must also be suitably changed (Sec. 17, 18, 19, 146)

Secretarial Procedure for Alteration of Domicile Clause

The following steps are to be taken by the Secretary where the location of the Registered office of the company is to be changed ;

(a) Where the Registered office is to be changed with in local limits.

[i] The Secretary should convene a meeting of the Board of Directors to decide on the change of address.

[ii] After the Board resolution to effect the change has been passed a notice of the change must be filed with the Registrar within 30 days.

[iii] He should give a public notice, through advertisement and other media, to communicate the change to the shareholders and the general public.

(b) Where the Registered office is to be changed outside the local limits but within the same states

[i] A meeting of the Board of Directors should be convened by the Secretary to decide about the change and fix up the date, time, place

and agenda of the general meeting to pass a special resolution for the change.

[ii] The secretary should then issue notices for the general meeting proposing the special resolution, along with a suitable explanatory statement explaining the reasons for the change.

[iii] He should make necessary arrangements for holding the general meeting.

[iv] A copy of the special resolution passed along with the explanatory statement must be filled with the Registrar within 30 days.

[v] He should send a notice of the change to the Registrar within 30 days after the office has been shifted.

(c) Where the Registered office is to be changed outside the State :-

[i] He should convene a Board meeting to decide about the change and to fix up the date, time, place and agenda of the general meeting to pass a special resolution for altering the Memorandum of Association in this regard subject to confirmation by the Company Law Board.

[ii] Notices for the general meeting proposing the special resolution should then be issued along with a suitable explanatory statement.

[iii] He should make necessary arrangement for holding the general meeting.

[iv] A copy of the special resolution with the explanatory statement must be sent to the Registrar within 30 days.

[v] An application should then be made to the Company Law Board for confirming the change ;

[vi] Notices should also be given to every debenture-holder. Creditor or any other person whose interest may be affected by the change and their consent should be obtained or their claim or debt discharged or secured.

[vii] On receipt of the order of confirmation from the Company Law Board a certified copy of the same together with a printed copy of the altered Memorandum must be filed with the Registrar of each of the states within 3 months of the date of the order. If the certified copy of the

order is not filed within 3 months, or such extended time allowed by the Company Law Board, the alteration will become void. The Registrars of both the states concerned will then register the confirmation order and certify the registration within one month.

[viii] He should then file a notice of the change with the Registrar of the new State within 30 days from the date when the change becomes effective.

[ix] Lastly, he should see that the necessary changes are made in every copy of the Memorandum and Articles of association, records, documents, books, common seal, etc.

Alteration of the Objects Clause

The objects clause of the Memorandum can be altered only in so far as it enables the company :

(a) to carry on its business more economically or more efficiently

(b) to attain its main purpose by new or improved names;

(c) to enlarge or change the local area of its operation;

(d) to carry on some business which under existing circumstances may conveniently and advantageously be combined with the business of the company;

(e) to restrict or abandon any of its existing objects;

(f) to sell or dispose of the whole, or any part of the undertaking of the company; and

(g) to amalgamate with any other company.

To make such an alteration, the company must pass a special resolution and obtain confirmation of the company Law Board by making a petition for that purpose. The companies Act requires that before confirming the alteration, the Company Law Board must be satisfied in respect of the following :

[i] that sufficient notice has been given to every creditor and every other person whose interest may be affected, by the proposed alteration; and

[ii] that with respect to Every creditor, either his consent to the alteration has been obtained; or his debt or claim has been

discharged, or has been determined or has been secured to the satisfaction of the Company Law Board

The Company Law Board is also required to have the notice of the Company's petition for confirmation served on the Registrar and give him a reasonable opportunity to appear before the Board and State his objections or suggestions, if any. Thereafter the Company Law Board may confirm the alteration wholly or in part, and on such terms and conditions as it thinks fit. While exercising its powers the Company Law Board is expected to have due regard to the rights and interest of every class of members and creditors.

On receipt of the confirmed order, the Company has to file with the registrar a certified copy of the order and printed copy of the Memorandum as altered. This must be done within 3 months from the date of the order; and the Registrar must register and certify the registration of the change within a month from the date of filing the relevant documents. The alteration is complete only when a certificate of registration has been issued by the Registrar (Sec. 18).

Secretarial Procedure for Alteration of Objects Clause

Where any change in (he objects of the company is desired, the Secretary should take the following steps:

[i] He should arrange a meeting of the Board of Directors to recommend the proposed change. An explanatory letter giving reasons for proposed change should be approved by the Board to be issued to the members. The directors should resolve to call an Extraordinary General Meeting to pass a special resolution and fix the date of the meeting. The form of the special resolution to be moved may also be recommended by the Board.

[ii] Notice of the Extraordinary General Meeting must be issued not only to the shareholders entitled to attend and vote but also to the debenture holders, creditors, and all other persons whose interest may be affected by the proposed change. A copy of the circular letter should also be sent to each person along with the notice.

[iii] After the special resolution has been passed approving the change, copies of the resolution should be submitted to the chairman of the meeting for his signature.

[iv] A petition should then be made to the Company Law Board for confirmation of the change. At the same time, notice of the company's petition should be sent to the Registrar.

[v] If any person makes application to the Company Law Board for the alteration to be cancelled, either his consent has to be obtained or his claim must be discharged or secured by adequate provision of security.

Information regarding the consent obtained, or the discharge of debt or provision of security mode, should be communicated to the Company Law Board.

[vi] On receipt of the confirmation order of the Company Law Board, copies at the Memorandum of Association must be printed incorporating the change.

[vii] A copy of the confirmation order and a certified copy of the Memorandum as altered should then be filed with the Registrar. The change is Registered and a certificate of registration of the change is issued by the Registrar within a month. The certificate should be obtained from the Registrar in due time.

Alteration of Capital

The procedure for alteration of capital and the power to make such alteration are generally provided in the Articles of Association of a Company. If the power and procedure are not laid down in the Articles, the Company must alter the Articles by passing a special resolution. If so authorized by the Articles, a company may alter its share capital so as to :

(a) Increase the amount of its share capital;

(b) Consolidate and divide its share capital into shares of higher denomination;

(c) Sub-divide the existing shares into shares of lower denomination; however, the proportion between the amount paid and the amount, if any, unpaid on each reduced share must be the same as it was for the share before reduction;

(d) cancel the unissued capital;

(e) convert all or any of its fully paid shares into stock and reconvert stock into shares.

A company may alter its memorandum to increase the share capital provided it is authorised by the Articles ot Association. If the Articles do not authorise such alteration, the Articles must first be altered to that effect by passing a special resolution. Consolidation is the process of combining a specified number of shares into one new share having a nominal value equal to the aggregate of the shares into one new share having a nominal value equal to the aggregate of the shares so consolidated. Fully paid up shares are converted into "stock" for the purpose of its division into fraction of any denomination. Such stock can be reconvened into shares as and when found necessary. A company may also diminish the amount of its nominal share capital by cancelling the shares which remain unissued at the date such decision is taken. However, this should be distinguished from reduction of capital which means reducing the value of shares already issued. Alteration of share capital can be effected by the company by passing an ordinary or special resolution in general meeting. A copy of the resolution along with the explanatory statement must be filed with the Registrar within 30 days of the passing of the Resolution. A notice of the alteration must then be filed with the Registrar within 30 days specifying the nature of the alteration. If there is any default in giving notice to the Registrar, every officer of the company who is in default is punishable with a fine up to Rs. 50 per day of such default.

Secretarial Procedure for the Alteration of Capital

The steps to be taken by the Secretary for the alteration of capital may be outlined as follows :

[i] Verify whether the intended alteration is authorised by the Articles. If not, the Articles should first be altered accordingly by passing a special resolution.

[ii] Convene a Board meeting to recommend the alteration and fix up the date, time, place and agenda of the general meeting to pass an ordinary or special resolution as required by the Articles.

[iii] In case of consolidation or sub-division of shares or conversion of shares into stock, check up with the Stock Exchange concerned to ascertain whether they have any objection.

[iv] Issue the notices of general meeting along with an explanatory statement.

[v] Make necessary arrangement to hold the general meeting and pass the resolution. If it is a special resolution, a copy of the same along with the explanatory statement should be filed with the Registrar within 30 days.

[vi] A notice of the alteration should then be filed with the Registrar within 30 days. In case of increase in authorized capital requisite registration fees for the increased capital should also be paid along with the notice. On receipt of the notice the Registrar will make necessary alterations in the company's Memorandum and Articles.

[vii] See that necessary changes are made in the Memorandum, Articles, Share certificates and other records, documents and registers to give effect to the alteration.

Reduction of Share Capital

A company, if so authorised by its Articles, may reduce its share capital by passing a special resolution in the general meeting and obtaining confirmation of the court in that respect. Thus, a company may

(a) Extinguish or reduce its liability on its shares which are not paid-up; and

(b) Cancel any paid-up share capital which is lost; or is unrepresented by available assets ; or

(c) Pay off any paid-up share capital which is in excess of its needs; and to that extent alter the Memorandum of Association by reducing the amount of its share capital.

Some typical forms of Special resolution which may be passed arc given below:

(a) When unpaid liability on shares is reduced

"Resolved that the share capital of the company may be reduced from Rs. 60 lakhs divided into 6 lakhs Equity shares of Rs. 10 each to Rs. 30 lakhs divided into 6 lakhs Equity shares of Rs. 5 each by extinguishing the liability in respect of the unpaid capital to the extent of Rs. 5 per share."

(b) When paid-up share capital not represented by assets is cancelled

"Resolved: That the Share capital of the company be reduced from Rs. 60 lakhs divided into 6 lakh Equity shares of Rs. 10 each to Rs. 30 lakhs divided

into 6 lakh Equity shares of Rs. 5 each fully paid, and that such reduction be brought about by cancelling the share capital which is lost and is not represented by available assets".

(c) When paid-op capital in excess of the company's requirements is paid off:

"Resolved: That the share capital of the company be reduced from Rs. 60 lakhs divided into 6 lakh Equity shares of Rs. 10 each fully paid, to Rs. 30 lakhs divided into 6 lakh Equity shares of Rs. 5 each fully paid, by repaying Rs. 5 per share to each shareholder being capital in excess of the requirements of the company".

Procedure for reduction of capital by Special Resolution

An Extraordinary General Meeting has to be convened for the purpose of passing a special resolution. When the appropriate special resolution has been passed, petition must be made to the court for confirmation of the reduction.

If the proposed reduction involves either reduction of liability on unpaid capital or paying off any paid-up share capita), any creditor of the company is entitled to object to the reduction. The court is required to ascertain and settle a list of such creditors with the amount of their respective claims. The court may issue Public notices fixing a day or day? within which creditors not entered the list are to claim to be so entered, or are to be excluded from the right of objection to the reduction of capital.

If any officer of the company knowingly conceals the name of any creditor, or knowingly misrepresents the nature or amount of the debt or claim of any creditor or is a party to such concealment or misrepresentation, he is punishable with imprisonment for a period upto one year, or with fine or with both.

Where a creditor does not give his consent to the proposed reduction of capital, the company must either discharge or determine the claim or debt and obtain bis consent. Otherwise, the court may require that the company should provide for the full amount of debt or claim of any creditor or is a party to such concealment or misrepresentation, he is punishable with imprisonment for a period upto one year, or both. However, under special circumstances, the court may decide that objection of any class of creditors shall not be a hindrance to the reduction of capital.

On the confirmation of the court of the reduction of capital, the company must submit to the Registrar a certified copy of the court's order and of the minutes of the general meeting approved by the court showing the altered share capital as approved :

[i] the amount of the share capital

[ii] the number of shares into which is to be divided

[iii] the amount of each share and

[iv] the amount if any, which is deemed to be paid op on each share.

The Registrar will then register the order and the minutes and certify the registration. The requirements of the Companies Act may be taken to have been complied with only on the issue of the certificate of Registration of the order and minutes by the Registrar.

Secretarial Procedure for Reduction of Capital

The steps to be taken by the Secretary in connection with the reduction of capital may be outlined as follows:

[i] Examine the Articles of Association to see whether it authorise the reduction of share capital. If not, necessary procedure for the alteration of the articles accordingly should be completed before taking further steps.

[ii] Convene a Board meeting to approve of the scheme of reduction, and to fix the date, time. place, agenda of the general meeting to pass a special resolution to that effect and for making consequential changes in the Memorandum of Association. The form of special resolution, to be proposed in that meeting and the explanatory statement to be sent with the notice; are also to be approved by the Board meeting.

[iii] Send notices of the general meeting along with a copy of the explanatory statement explaining the reasons of the reduction.

[iv] make arrangements for the general meeting and get the resolution passed.

[v] File a copy of the special resolution with the Registrar along with a copy of the explanatory statement within 30 days.

[vi] make a petition to the court along with a copy of the minutes of the general meeting for the confirmation of the reduction.

[vii] Take necessary steps for settlement of the objections and claims of creditors or for complying with the directions of the court in this regard under Sec. 101.

[viii] On receipt of the order of confirmation from the court, file a certified copy of the order and the minutes approved by the court with the Registrar. The original copy of the order should also be produced before him, upon which the Registrar will register the order and minutes and issue a certificate of Registration. The reduction will be effective on such registration.

[ix] If so, directed by the court in its order, the words "and reduced" should be inserted as the last words of the name of the company in all documents and letterheads and the reasons of reduction should be notified in newspapers for public information.

[x] The Memorandum and Articles of the company and other documents and papers should be altered accordingly and copies of the altered Memorandum and Articles should be filed with the Registrar.

[xi] Take necessary steps for issuing fresh share certificates or for making necessary endorsements on the share certificate or for refunding of capitals as per the scheme or reduction.

Reserve Capital

A limited company may, be special resolution, decide that a part of its share capital, which has not been called up. shall not be called up except in the event of Winding up of the company. The amount of uncalled capital so decided to be set apart by the company is known as "Reserve Capital" of the company.

Articles of Association

The rules and regulations which are framed for the internal management of a company are set out in a document known as the Articles of Association. Every private company limited by shares as also a company limited by guarantee and an unlimited company must have Articles of Association which must be Registered along with the Memorandum. But a public company limited by shares may or may not have its own Articles. The Articles provide the rules and

regulations for the conduct of day-to-day administration of the company. While the memorandum provides the foundation and a broad frame work for the functions of the company, the Articles are C3ncerned with the mode of realizing the objects laid down in the memorandum. The Articles regulate the relationship between the company and its members and employees; the memorandum regulates the relation of the company with the creditors and general public. Thus the Articles of Association serve the essential purpose of supplementing the Memorandum.

Alteration of Articles

The Articles of Association can be altered or added to by passing a special resolution provided

(a) the alteration is not contrary to the provisions of the Act,

(b) it is not inconsistent with or beyond the provisions of the Memorandum, and

(c) it does not increase the liability of a member without his written consent by compelling him to take more shares than he bad hold prior to the alteration.

Arising out of several decisions, companies are also required to keep in view the following restrictions with regard to alteration of Articles:

[i] No alteration should be made enabling the company to commit a breach of contract with an outsider,

[ii] Any alteration made should be in the interest of the company as a whole; and

[iii] it should not be such as would constitute a fraud by the majority on the minority.

Procedure for alteration of Articles

Subject to the memorandum and the restrictions mentioned above, the Articles of Association of a company can be altered partially or wholly. A meeting of the Board of Directors is held to decide on and recommend the alteration. The meeting also fixes up the date, time, place and agenda of the Extraordinary general meeting to pass the special resolution and also approves the special resolution and explanatory statement required to be sent along with

the notice of the meeting. Notices of the general meeting, proposing the special resolution must be sent to every member atleast 21 days before the meeting along with a copy of the explanatory statement. If the Articles have been completely or substantially altered, a new printed copy of the altered Articles must be filed with the Registrar along with the resolution.

Specimen of Special Resolution

A special resolution on the following lines may be passed:

(a) When the articles are to be amended or altered partially:

"Resolved : That the articles of Association of the company be altered by deleting Article 144 thereof and substituting in place of the said Article, the article set out below:

"Article 144......................................."

(Set out the Articles as amended)

(b) When an entirely new set of Articles is to be adopted :

"Resolved: That the Articles contained in the printed document submitted to this meeting and signed for identification by the Chairman be, and the same are hereby adopted as the Articles of Association of the company in place of and to the entire exclusion of all previous articles."

Duties of the Secretary Re-Alternation of Articles

The following steps have to be taken by the Secretary if the Articles of Association of the company have to be altered :

(i) Convene a board meeting, in consultation with the directors, to decide on the alterations and to fix up the day, time, place and agenda of the extra ordinary general meeting where a special resolution has to be passed to effect the change.

(ii) See that the alterations are not inconsistent with the Memorandum or do not increase the liability of members or do not infringe the restrictions imposed by the Companies Act.

(iii) Issue notices of the general meeting containing the proposed special resolution to be placed before the meeting along with an

Explanatory Statement explaining the implications of (he change atleast 21 days before the meeting.

(iv) Make necessary arrangements for the general meeting and getting the special resolution passed.

(v) File the special resolution and the Explanatory Statement with the Registrar in Form No. 23 within 30 days of the passing of the resolution, if the Articles have been completely or substantially altered, a new printed copy of the Articles has also to be tiled with the Registrar.

(vi) The effect of the change should be incorporated in all the copies of the Articles of Association.

Questions

1. Explain the nature and the duties of the secretary in connection with company promotion.

2. What do you understand by Preliminary contract? Draft a specimen preliminary contract of a public limited company proposed to be formed. Distinguish between preliminary contracts and provisional contracts.

3. "The Memorandum of Association of a company is its charter and it defines the limitations on the powers of the company established under the Act". Support this statement.

4. State the process of effecting alteration of the following clauses of Memorandum of Association;

   (a) Domicile clause

   (b) Objects clause

   (c) Liability clause,

5. What is meant by Articles of Association? How can Articles of Association be altered? State the restrictions on the alteration of Articles of Association.

LESSON - 2

COMMENCEMENT OF BUSINESS

Lesson Outline

- Commencement of Business
- Restrictions on commencement of Business
- Procedure for obtaining certificate for commencement of Business in case of Public Companies
- Procedure for obtaining certificate for commencement of Business in case of the Company having a share capital and has not issued prospectus
- Commencement of New Business of an Existing Company
- Procedure for Commencement of New Business of an Existing Company
- Specimen of Certificate of Commencement of Business
- Duties of Secretary at the Commencement Stage

COMMENCEMENT OF BUSINESS

A private company or a company having no share capital may commence business and exercise its various powers immediately, after it is incorporated. Once it has received its certificate of Incorporation, nothing further is required. A public Company, on the other band, must obtain a certificate to commence business - a trading certificate from the Registrar before it can commence business or exercise its borrowing powers. In order to obtain this certificate, the company must comply with Sec. 149 of the Act. If the company has issued a prospectus, then Sec. 149 (1) applies, and if it has not issued a prospectus. Sec. 149 (2) applies.

Restrictions on Commencement of Business

Sec. 149 (1) provides that if a company having a share capital has issued a prospectus, it must not commence business or exercise borrowing powers, unless-

(a) shares upto the amount of the minimum subscription have been allotted ;

(b) every director has paid to the company on each of the shares he has taken or contracted to be taken for which be is liable to pay in cash, the same

proportion payable on application and allotment on the shares offered for public subscription ;

(c) no money is, or may become, repayable to the applicants for shares or debentures, for failure to apply for, or to obtain, permission to deal the shares or debentures in any recognized stock exchange;

(d) a statutory declaration of compliance of clauses (a), (b) and (c) in Form No. 19 signed by one of the directors or the secretary has been filed with the Registrar.

Sec. 149 (2) states that if the company, having a share capital, has not issued a prospectus, it must not commence business or exercise its borrowing powers, unless:

(a) it has fifed with the Registrar a statement in lieu of prospectus:

(b) every director has paid to the company on each of the shares taken or contracted to be taken by him for which be is liable to pay in cash, the same proportion payable on application and allotment;

(c) a statutory declaration of compliance of clause (b) above in Form No. 20 signed by one of the directors or the secretary, has been filed with the Registrar..

When the company has complied with these conditions, the Registrar will issue a certificate that the company is entitled to commence business. This certificate is conclusive evidence that the company is now entitled to commence business. Any contract made by a company before the date of entitlement to commence the business shall be provisional and become binding on the date it is entitled to commence business.

If any public company commences business or borrows money before obtaining the certificate to commence business, every person who is responsible for doing this is liable to a fine upto Rs. 500 for every day during which contravention of Sec. 149 continues.

If the Company, does not commence business within one year of its incorporation, the court may order it to be wound up (Sec. 433 (c)), Also, the Registrar is empowered to remove its name from the Register of Companies as a defunct company under Sec. 560 of the Act.

Procedure for obtaining certificate for commencement of Business in case of Public Companies

(1). Minimum subscription amount mentioned in the prospectus should have been received in cash [Sec. 149 (1) (a)].

(2). The directors who have applied or contracted to take up shares should pay the amount they are liable to pay in cash, atleast a portion equal to the portion payable on application and allotment of shares offered for public subscription [Sec. 149 (1) (b)].

(3). Where the shares are to be quoted on the stock exchange necessary application must be submitted to it and approval obtained within the prescribe time [Sec. 149(1) (c)].

(4). Shares issued for cash to the public should be allotted.

(5). A declaration in Form No. 19 of the Companies (Central Government's) General Rules and Forms, 1956 verified by one of the directors or the secretary to the effect that the aforesaid conditions have been complied with should be filed with the Registrar of Companies. [Sec. 149 1) (d)].

(6). The stamp duty as prevalent in the state in which the company is registered should be paid according to the Indian Stamp Act.

(7). A treasury challan evidencing payment of requisite fees prescribed in Schedule X to the Companies Act, 1956 and in accordance with the Rule 22(1) of the Companies Rules and Forms should be attached.

(8). The company will then obtain from the Registrar the certificate for commencement of Business. [Sec. 149 (3)].

Procedure for obtaining certificate for commencement of Business in case of the Company having a share capital and has not issued prospectus

(1). Directors must pay on the shares taken up or contracted against payment, or have paid portion equal to the portion payable on application and allotment [Sec. 149 (2) (b)].

(2). Statement in lieu of prospectus in the form and containing particulars prescribed in Part I of Schedule III to the Act should be filed by the Company [Sec. 149(3) (a)].

(3). The statement should be accompanied by reports specified in part II of Schedule III;

(4). The statement should be filed atleast 3 days before the first allotment [Sec. 70 (I)];

(5). A declaration in Form No. 20 of the Companies (Central Government's) General Rules and Forms, 1956 duly verified by one of the directors or secretary to the effect the Gist mentioned condition has been complied with should be filed with the Registrar of Companies [Sec. 149 (2) (c)];

(6). Stamp duty as prevalent in the state in which the company is registered should be paid according to the Indian Stamp Act;

(7). A treasury challan evidencing payment of requisite fee prescribed in Schedule X to the Companies Act 1956 and in accordance with the Rule 22 (1) of the Companies Rules and Forms should be attached;

(8). The Company will then obtain from the Registrar the certificate for commencement of business [Sec. 149 (31].

Commencement of New Business of an Existing Company

Sec. 13 requires that every company formed on or after October 15, 1965 must state in its memorandum (i) the main objects to be pursued by the Company on its incorporation and objects incidental or ancillary to the attainment of the main objects (ii) other objects nod included in (ii) above Separately. Sec. 149 prohibits a company from commencing any business stated under other objects without obtaining the prior approval of the shareholders in general meeting by a special resolution. A similar requirement is stipulated in case of companies in existence before l5th October, 1965 if they desire to commence any new business which is not germane to the business it was carrying as on l5th October. 1965. It also requires the tiling with the Registrar a declaration in Form 20-A verified by one of the directors or secretary that the approval by special resolution has been given by the Company in general meeting. The Central Government may, however, on an application by the Board of directors, allow the company to commence new business, even if the special resolution is not passed by the company in general meeting but secures only a simple majority [Sec. 149 (2-B)]

In this connection, the Department of Company Affairs has clarified that new business means a business which is not germane to the existing business carried on by the Company. The guiding criterian, therefore, is whether the new activity is germane to the original business or not. In case the reply is 'yes' no special resolution is necessary and vice versa.

Procedure for Commencement of New Business of an Existing Company

1. The company should first ascertain whether the memorandum permits the proposed business and whether such business will be deemed to be new business within the meaning of Sec. 149. Otherwise it will be necessary to alter the memorandum.
2. The proposal to commence a new business should then be considered and approved by the Board.
3. Where necessary, applications will be made to the Central Government under the MRTP Act, and/or Industries (Development and Regulation) Act 1951 or to the Reserve Bank of India under the Foreign Exchange Regulation Act, 1973
4. Where the new business involves issue of further capital, approval of SEB1 will be obtained if necessary;
5. A general meeting will be held and a special resolution approving commencement of new business will be passed thereat. Where the resolution is passed with simple majority, an application will be made to the Central Government for its approval.
6. Special resolution in Form No. 23 of the Companies General Rules and Forms, 1956 should be filed with the Registrar of Companies within 30 days of passing thereof, after paying the requisite fee prescribed under Schedule X to the Companies Act, 1956 and in accordance with Rule 22 (1) of Companies General Rules and Forms, 1956 ;
7. The duly verified declaration signed by one of the directors or secretary in Form No. 20A of (he Companies General Rules and Forms, 1956 should be filed with the Registrar either within 30 days of the passing of the special resolution or before the commencement of new business, whichever is earlier.

8. The proposed changes in the nature of the Company's business should be advised promptly to the stock exchange where the shares are listed;

Specimen of Certificate of Commencement of Business

I hereby certify that A. B. Co. Ltd. of Madras which was incorporated under of Companies Act, 1956 on the 10th day of September, 1992 and which has this day filed a statutory declaration in the prescribed form that the conditions of Sec. 140 have been complied with, is entitled to commence business.

Given under my hand at Madras this 25th day of October One thousand nine hundred and ninety two.

(Signed)

Seal of the Registrar — Registrar of Company
Madras.

Duties of Secretary at the Commencement Stage

As already observed, a public Company can commence business only on the receipt of certificate of commencement of Business. Before a Company can apply for this certificate it must have received minimum subscription and allotted shares equivalent to this amount. Toe duties of the Secretary at this stage are -

1. To see that the conditions regarding commencement are strictly complied with :

2. To ensure that a declaration, signed by a director or the Secretary himself, is filed with the Registrar along with the prescribed fees stating that the conditions required to be fulfilled under the Companies Act have been complied with, and

3. To collect the certificate of commencement when it is ready.

Specimen Resolutions

Reduction of Share Capital

"RESOLVED that the capital of me Company be reduced from Rs……divided into……fully paid Equity Shares of Rs……each to Rs……divided into……fully paid shares of Rs……each by cancelling the capital, which has been lost or is unrepresented by available assets, to the extent

of Rs……per share on the said……shares which have been subscribed, and by reducing the nominal value of each share of Rs……each to Rs……each fully paid."

Opening of a Bank Account

"RESOLVED that a Current Account in the name of the company be opened with the……Bank at……and that the said Bank be, and is hereby, empowered to honour cheques, bills of exchange and promissory notes drawn, signed, accepted or endorsed for and on behalf of the company by any one director and countersigned by the secretary, and to act according to the instructions of the said director and secretary regarding the operation of the said Bank Account."

Approving the draft Prospectus

"RESOLVED that the draft Prospectus dated……placed before this meeting, two copies of which are signed by the Chairman and every director/proposed director named therein, be and is hereby, approved and adopted and that the secretary be, and he is hereby, authorized to file one such copy with the Registrar of Companies and to issue, circulate and advertise the said prospectus."

"RESOLVED further that the secretary be, and he is hereby, authorized to forthwith make an application for permission for the shares of the company to be listed and dealt in on me………Stock Exchange."

Affixation of Common Seal

"RESOLVED THAT............. equity shares of Rs. 10 each be and are hereby allotted to the persons, a list of whom has been placed before the meeting and initialled by the Chairman for the purpose of identification, bearing distinctive Nos. from ....to ....

RESOLVED FURTHER THAT the share certificates be issued for the shares allotted hereinabove in accordance with the Companies (Issue of Share Certificates) Rules, 1957.

RESOLVED FURTHER THAT Return of Allotment be filed with the Registrar of Companies for the equity shares allotted hereinabove.

RESOLVED FURTHER THAT the equity shares allotted hereinabove be got listed with the Stock Exchanges where the Company's equity shares are

already listed and the Company Secretary be and is hereby instructed to do all such acts, deeds and things as may be necessary to be done for listing of equity shares allotted hereinabove."

COMMENCEMENT OF NEW BUSINESS

Type of Resolution: Special Resolution

Resolved that pursuant to the provisions of section 149 (2A) and other applicable provisions, if any, approval is hereby given to the company for commencing and undertaking the business as stated in the new inserted sub-clause (4B) of the Objects clause of the Memorandum of Association and sub-clause (16) of the Memorandom of Association of the company as substituted, upon the said sub-clause becoming effective.''

EXPLANATORY STATEMENT:

Keeping in view the amendment made in the objects Clause of the Memorandum of Association of the company, it is necessary for the members to give their consent to the company under section 149(**2A**) by way of a special resolution for commencing the business as out in the substituted clause.

The Board of Direction of the company has already taken a decision, subject to your approval, for commencing the aforementioned new business in its meeting held on .... Hence the resolution is recommended for your approval.

None of the Directors is interested in the resolution.

Questions

(1). Discuss the steps that are to be taken before a company can commence its business.

(2). Detail the procedure for obtaining certificate of commencement of business

(a) of a company which has not issued a prospectus

(b) of a company which has issued a prospectus

UNIT II

LESSON - 1

SHARE CAPITAL

After reading this unit, the students should be able to understand the Procedure for Allotment of Shares, Issue of Share Certificate and Share Warrants, Procedure relating to Transfer of Share and Transmission of shares and forfeiture of Shares.

Lesson Outline

- Classes of Capital
- Types of shares
- Procedure for Issue of Shares
- Registration and Issue of Prospectus
- Filing of forms with the Registrar
- Different Terms used for the Issue of Shares
- Allotment
- Regular Allotment of Shares
- Restrictions on the Allotment
- Procedure for Allotment of Shares
- Returns of Allotment

SHARE CAPITAL

It is the capital raised by a company through the issue of shares. Only companies limited by shares and registered with a share capital can raise capital through the issue of shares. Companies limited by guarantee or unlimited companies cannot have share capital.

Classes of Capital

Share capital is used in a variety of senses. It may mean that ultimate or maximum capital to be raised through shares or the capital which the company wishes to raise for immediate purposes or even the capital actually raised at any particular time. Usually the following classification of capital is made

[i] **Authorized, Nominal or Registered Capital:** This is the maximum amount of capital which a company can raise and its amount is stated in the Memorandum of the company. It is also stated in the annual returns. It is not necessary that the whole of the Authorised capital should be issued to the public at the time of the incorporation of the company.

[ii] **Issued Capital:** It is the part of the authorised or nominal capital which the company issues for the time being for public subscription and allotment. This is computed at face or nominal value.

[iii] **Subscribed Capital:** It is the portion of the issued capital at face value which has been subscribed or taken into by the subscriber of shares in the company. It is clear that the entire issued capital may or may not be subscribed.

[iv] **Called up Capital:** It is the portion of the subscribed capital which has been called up or demanded on the shares of the company.

[v] **Uncalled Capital:** It is the total amount not yet called up or demanded by the company on the shares subscribed, which the share holders are liable to pay as and when called.

[vi] **Paid-up Capital:** It is that part of the total called up amount which is actually paid by the shareholders.

[vii] **Unpaid Capital:** It is the total of the called up capital remaining unpaid.

[viii] **Reserve Capital:** It is the part of the uncalled capital of a company which the company has decided by special resolution in terms of Sec. 99 of the Companies Act, 1956. not to call except in the event of the company being wound up and thereafter that portion of the share capital shall not be capable of being called up except in the event of and for those purposes.

[ix] **Fixed and Circulating Capital:** Fixed capital comprises the part of paid-up share capital invested in fixed assets acquired for retention and use e. g., land, buildings. Plant & machinery, whereas circulating or floating capital is that part invested in acquiring current assets like stock of goods, bills of exchange, cash etc. required for use in the day-to-day business operations and keeps on circulating.

[x] **Loan or debenture capital:** It is the money raised by a company by the issue of debentures and is not capital in the true sense of the term, but a borrowing. It is the money which the company has borrowed and so a debt due by the company.

Definition of Shares

According to Sec. 2 (46) of the Companies Act, 1956 a share is "a share in the capital of a company, and includes stock except when a distinction between stock and shares is expressed or implied"

Types of shares

There are three classes of shares, they are:

(a) Preference shares;

(b) Ordinary shares; and

(c) Deferred shares

(a) Preference shares:

As the name implies, these shares enjoy preference over other classes of shares in the matter of payment of dividend and return of capital. The rate of dividend on preference share is fixed. But if any dividend is declared by the company at all, dividend at the fixed rate must be paid to the preference share holders before any dividend is paid to the equity shareholders. Preference shares also get preference in the matter of return of capital when the company goes into liquidation.

Preference shares may again be of several types viz

[i] Non-cumulative preference shares

[ii] cumulative preference shares

[iii] participating preference shares and

[iv] redeemable preference shares ;

[i] Non-cumulative preference shares: These shares get preference in the matter of payment of dividend at a fixed rate in any year, only if there is any profit available for distribution in that year. If the share holders of these shares

do not get preference dividend in any year due to inadequate profits, they cannot claim payment of the arrear dividends out of the profits of any subsequent years.

[ii] Cumulative Preference shares: In the case of these shares, if dividends at the fixed rate cannot be paid in any year due to inadequate profits, arrears of dividends will accumulate and will have to be paid out of the profits of future years. However if the company goes into liquidation no arrears of dividend are payable unless such dividends have actually been declared or the Articles provided for such payment.

[iii] Participating Preference shares: Like other types of preference shares, these shares also enjoy the right of getting a fixed rate of dividend in preference to other classes of shares. But in addition, to that, the holders of these shares are also entitled to a further share in the surplus profits after dividend at a certain rate has been paid to the equity shareholders.

[iv] Redeemable Preference shares: Ordinarily, the amounts paid on the shares are not redeemable (refundable) except when the company goes into liquidation. But the Act allows a public limited company to issue preference shares, subject to certain conditions, the amount of which may be redeemed during the life-time of the company. These are known as redeemable preference shares. Under Sec. 80 of the Act, a company may issue such shares subject to the following conditions:

(1). that the Articles must permit the issue of such shares;

(2). that no such share shall be reeedmed unless they are fully paid-up;

(3). that shares shall be redeemed only out of profits of the company available for dividend or out of proceeds of a fresh issue of shares;

(4). that the premium, if any, payable on redemption shall be provided out of the profits of the company or out of the company's share premium account; and

(5). that, where the redemption is made out of profits, an equivalent sum shall be transferred to a capital Redemption Reserve Account.

(b) Equity shares

Shares which do not enjoy any preferential right in the matter of payment of dividend or repayment of capital are known as equity shares. Dividend is paid to the holders of these shares after the preference dividend at a fixed rate has

been paid. The rate of dividend payable on these shares is not fixed and may vary from year to year depending upon the amount of profits available and the intention of the Board of Directors. On the liquidation of the company, the amount of equity capital is repayable only after all other claims, including that of the preference shareholders, are satisfied.

(c) Founder's shares or Deferred Shares

Such shares are those shares which were usually issued 10 the founders 01 promoters of the company but after the amendment to the Companies Act in 1956, these shares can be issued only by a private company and which is not the subsidiary of a public company. These shares are also sometimes issued to the underwriters for the services rendered by them. Holders of Founders shares are entitled to get the dividend after the preference shareholders and the holders of Equity shares. Usually they are paid according to a certain proportion, say, half of the surplus or according to a pre-determined ratio.

(d) Right Shares

If the Board of directors decides to increase the subscribed capital but within the limit of the authorized capital of the company, they may do so only after the expiry of two years from the formation of the company or after the expiry of one year after the first allotment of shares.

(e) Bonus Shares

When a company has accumulated a large amount of reserve out of profits of the previous years or has made abnormal profits, it may capitalize the reserve or the profits and thus increase the subscribed capital provided the Articles permit such an issue. Bonus shares may be issued out of the capital redemption reserve fund arising from the redemption of redeemable preference shares under Sec 85 (5). Bonus shares may be issued out of the share premium account under Sec. 78 (2). These shares are fully paid-up and arc distributed to the existing shareholders, as far as possible, in proportion to their holdings.

Procedure for Issue of Shares

Issue of shares by a company is subject to the provisions of the Companies Act. 1956 and those of the Securities Exchange Board of India Act. The application for seeking consent of the Central Government should be made in the prescribed form.

The following preparatory measures should have been duly taken:

(1). Call a Board Meeting to pass a resolution authorising the Secretary to make an application and file the same with the SEBI after getting it certified by the company's auditors.

(2). The Secretary shall prepare the application form for issue of securities after carefully following the recent guidelines, and it must-be sent to the auditors for their certificate.

(3). The following papers should be enclosed to the application:

[i] A demand draft drawn for the requisite amount of application fee for consent.

[ii] Two copies of Memorandum and Articles of Association.

[iii] Particulars of previous application.

[iv] Latest audited Balance sheet and P/L accounts.

[v] List of existing non-resident shareholders,

[vi] Copy of approval by the Central Government of the terms of foreign collaboration, if any.

[vii] Two copies of Draft prospectus, if the issue it through prospectus.

[viii] Copy of any agreement for supply of technical assistance indicating the royalty payable.

[ix] Any other statement which cannot be embodied in the application itself.

(3). Supply further information as may be required.

(4). On receipt of the permission the securities should be issued within the stipulated time.

(5). Two certified copies of the final prospectus should be sent to SEBI.

In addition to above, the following points may also be included

Registration and Issue of Prospectus

After finalizing the draft prospectus, arrangements should be made for printing of the prospectus and a printed copy of the prospectus must be registered with the ROC & SEBI on or before publication.

Filing of Forms with the Registrar

[i] Return of allotment should be filed within 30 days of the date of allotment along with the fees as prescribed.

[ii] Particulars of contracts relating to shares has also to be filed.

[iii] The statement of the amount or rate percentage of the commission payable on shares together with a copy of the contract for payment of commission, if any, should be filed with the Registrar before such commission is paid.

Different Terms used for the Issue of Shares

Issue of shares at Par : When the shares are issued by the company at their face or nominal value to the subscribers, the shares are said to have been issued at par. If for instance, a share of the nominal value of Rs. 100 is issued at Rs. 100, the share is issued at par.

Issue of shares at Discount : When a company issues shares at less than their face or nominal value, the shares are said to have been issued at discount. A company can issue shares at discount according to Sec. 79 under the following conditions.

(i) If the shareholders have passed a resolution in the general meeting to issue shares at discount.

(ii) The resolution must specify the maximum rate of discount at which the shares are to be issued.

(iii) Such a resolution has been confirmed by the Company Law Board.

(iv) If the shares of the class proposed to be issued at a discount have already been issued by the company.

(v) The shares can be issued within two months from the date of sanction of the Company Law Board or within such extended time as the court may prescribe.

(vi) The rate of discount should be that which has been fixed by the shareholders but which should not exceed ten per cent.

(vii) At least one year must have elapsed since the date on which the company was entitled to commence business.

(viii) Every prospectus issued by the company must state the particulars about the discount on which the shares are being issued.

Issue of Shares at Premium: A company may issue shares at a premium (i.e.,) at a higher price than the nominal or face value of shares. The premium so received cannot be treated as profit and therefore cannot be distributed to the shareholders in the form of dividend. The premium received on the issue of shares should be transferred to a separate account called "Share Premium Account ". It can be used for the following purpose :

(i) To issue bonous shares to the shareholders provided there is still some unissued capital.

(ii) To write off the preliminary expenses.

(iii) To write off the expenses or commission paid, discount allowed on the issue of shares or debentures or underwriting commission.

(iv) To provide for the premium payable on the redemption of any redeemable preference shares or any debentures.

Allotment

Allotment means appropriation to an applicant by a resolution of the Board of directors of a certain number of shares in response to his application. It means issue of shares in favour of a person for valuable consideration.

Regular Allotment of Shares

Sec. 69 lays down certain restrictions on allotment of shares and if those restrictions are not observed, the allotment will be considered "Irregular Allotment". The following are those restrictions and the Secretary should see that there is no infringement of these rules :

Restrictions on the Allotment

(1). The company must have issued the prospectus or a statement in lieu of prospectus and duly filed to the registrar.

(2). The application money should not be less than five per cent of the nominal value of the shares.

(3). The application money received must have been deposited in a scheduled bank.

(4). The minimum subscription must have been applied for and paid in cash and if paid by cheque, they must have been encashed. The minimum subscription must have been applied for within 120 .days of the issue of the prospectus before the allotment can be made,

(5). Shares cannot be allotted until the beginning of the fifth day after that on which the prospectus is issued or such later date, if any, and is specified in the prospectus.

(6). If in the prospectus it is stated that the company will make an application to the stock exchange for dealing in its shares or debentures and if no application to the stock exchange has been made within ten days of the issue of the prospectus, (he allotment will be void. Similarly, if the stock exchange rejects the company's application before the expiry of ten weeks from the date of the closing of the subscription list or such longer period hut not exceeding seven weeks, the allotment would be void.

(7). If the stock exchange has not granted the permission to the company for dealing its shares or debentures, the company must return the moneys received from the applicants with interest. If the money is not repaid within eight days after the company becomes liable to repay it, the directors of the company shall be jointly and severally liable to repay the money with interest at 12 percent, p.a. from the expiry of the 8th day.

(8). If the company had made applications to several stock exchanges, the allotment will be irregular it any one or more of such stock exchanges has or has not granted permission to the company for dealing in its shares or debentures.

(9). Allotment must be made within a reasonable time though no fixed time for the allotment is fixed by the Companies Act.

(10). No shares can be allotted to a non-resident without the prior permission of the Reserve Bank under the Foreign Exchange . Regulations

Procedure for Allotment of Shares

When the Application and Allotment sheets or Books are ready, the Secretary in consultation with the Chairman or the Managing Director of the company calls a meeting of the Board of directors for the purpose of allotment of shares. The directors at their meeting may allot the shares. The secretary places the application forms and sheets before the directors.

(i) **Procedure when the minimum subscription is not applied:** If the subscription amount is less than the minimum subscription, the directors do not allot the shares and the application money received will have to be refunded to the applicants within 130 days of the issue of the prospectus. If not the amount must be refunded together with interest at the rate of 6% from the 131st day till the money is refunded to the applicants.

(ii) **Procedure for Allotment when shares are over-subscribed:** When there are more applications for shares than the number of shares offered to the public, a definite decisions will have to be taken by the director Lottery method, pco-rata method, and Arbitrary method are some methods which are adopted for allotment 10 such a case. In the case of listed shares, the procedure of allotment of shares will have to be followed in consultation with the stock exchange authorities.

(iii) In terms of the decided allotment policy, the Secretary performs the Secretarial duties. He gets the number of shares to be allotted, entered against the number of each successful applicant, in the share application and Allotment list or Register and submits it to the Board.

(iv) The Chairman of the Board initials every sheet of the lists and signed at the end of the list.

(v) In the end, the Board passes an "Allotment resolution" authorizing the Secretary to issue letters of allotment and letter of regret, as the case may be, to the respective applicants.

Letters of Regret

These letters which are printed are sent to those applicants to whom no shares have been allotted. Cheques in respect of the amount received as application money and which has to be refunded are attached with such letters.

Renunciation of Allotment

An allottee of shares may renounce either all the shares or apart of them in favour of a third party. This is known as "Renunciation of Allotment" by the allottee. This right of renunciation can be exercised only when the Articles of the company so provide. The allottees can renounce this right before the allotment money is paid and before their names are entered in the Register of Members. If the allottee wishes neither to renounce this right in favour of a third party nor does he want to exercise the right in shares be may do so.

Splitting of Allotment

If the allottee wishes to renounce the shares in favour of more than one person, he may make a request to the company to split the Allotment Letter into a number of Allotment letters, each letter for a part of the number of shares originally allotted to him.

The company on receipt of such a request makes a remark to that effect in the application and allotment sheets regarding the details of the split and also in a separate sheet. The company thereafter issues the necessary split letters of allotment. Thus the shares can be transferred by the original allottee to a number of persons without the payment of necessary transfer fee. It may be mentioned here that the holder of the split letters can renounce such aliotment of shares.

Returns as to Allotment

After the allotment has been made by the directors, the Secretary has to file with the Registrar a Statement called "Return of Allotment" within 30 days or any other extended period which may be allowed by the Registrar. The return of Allotment should give the following details:

1. The number of shares allotted
2. The nominal amount of such shares
3. The names, address and description of the allottees
4. The amount paid or due and payable on each share
5. Particulars of shares allotted for consideration other than cash which have been allotted to promoters, vendors etc.
6. The nominal amount of shares allotted as bonus shares, the names, addresses, descriptions etc. of the allottees.

Review Questions

(1). Why does a Company issue different kinds of shares? Give a clear idea about the kinds of shares which a public company can issue and state the statutory provisions relating to the issue of shares at a premium.

(2). State the secretarial work involved in redemption of Redeemable Preference share.

(3). What are the statutory restrictions as to allotment of shares 7 State the secretarial work relating to the allotment of shares in case of over subscription of capital.

(4). What is the effect of irregular allotment? Draft a letter of regret.

(5). Explain ;

[i] Splitting of allotment

[ii] Return as to allotment

(6). A company proposes to offer shares for subscription by the public. Describe the secretarial work relating to the above matter. Give a specimen resolution of allotment of shares.

LESSON – 2

ISSUE OF SHARES, SHARE CERTIFICATES AND SHARE WARRANTS

Lesson Outline

- ✦ Issue of Share Certificates
- ✦ Procedure for Issue of Share Certificates
- ✦ Rules for Issue of Share Certificates
- ✦ Procedure for re-issue of Share Certificates
- ✦ Procedure for Issue of Duplicate Share Certificate
- ✦ Duties of Secretary regarding issue of Share Certificates
- ✦ Duties of the Secretary regarding the reissue of Duplicate Share Certificates
- ✦ Procedure for the Issue of Share Warrants
- ✦ Duties of the Secretary regarding issue of share warrants
- ✦ Procedure for Forfeiture of Shares
- ✦ Re-issue of Forfeited Shares

ISSUE OF SHARE CERTIFICATES

A "Share certificate" is a certificate issued by the company under its common seal specifying the shares held by any member. Thus every member is entitled to receive a certificate which represents his interest in the company's share capital.

Procedure for Issue of Share Certificates

A company can Issue share certificate (i) in pursuance of a Board resolution and (ii) on surrender to the company of its letter of allotment or its fractional coupon of requisite value, save in cases of issues against letters of acceptance or of renunciation, or in cases of issue of Bonus shares.

Provided that if the letter of allotment is lost or destroyed the Board may impose such reasonable conditions as to evidence and indemnity and the payment of out-of-pocket expenses incurred by the company in investigating evidence, the Board thinks of fit.

Rules for Issue of Share Certificates

In order to provide strict control over the issue of share certificates by the company, the Central Government has issued certain rules (The companies (issue of share Certificates) Rules, 1960). The rules, in brief are as under :

1. Issue of Certificate against documentary evidence: When a company issues any capital, no certificate of any shares in the company is to be issued except

(i) in pursuance of a resolution passed by the board and

(ii) on surrender to the company of its letter of allotment or of its fractional coupons of requisite value, save in cases of issue against 'letter of acceptance' or renunciation of issue of bonus shares. If the letter of allotment is lost or destroyed, the Board may impose such reasonable terms as to evidence and indemnity, and the payment of out-of-pocket expenses, as it thinks fit.

2. Surrendering of Original Certificate: No certificate of any shares or shares shall be issued either in exchange for those which are subdivided or consolidated or in replacement of those which are defaced, torn, or old, decrepit, worn-out; or where the pages on the reverse have been fully utilized, unless the certificate in lieu of which it is issued is surrendered to the company. The company may charge fee for not exceeding Rs. 2 per certificate for the issue of such duplicate certificate.

3. Consent of board and payment of fees: No duplicate share certificate shall be issued in lieu of those that are destroyed or lost, without the proper consent of the Board or without payment of fees, and on such reasonable terms as to evidence and indemnity and the payment of out-of-pocket expenses incurred by the company in investigating evidence, as the Board may think fit.

4. Form of share Certificate : We have already specified that no special form of share certificate is prescribed by the Government. But every certificate must specify the name or names of the persons in whose favour the certificate is issued, the shares to which it relates and the amount paid up thereon. When any duplicate share certificate is issued in any of the cases mentioned above, it must state on its face and also on (he counterfoil to the effect that it is issued in "lieu of share certificate No. subdivided / replaced or consolidation of shares".

5. Sealing and signing of share certificates : Every share certificate shall be issued under the seal of the company which shall be fixed in presence of

(i) two directors or persons acting on behalf of the directors under a duly registered power of attorney, and

(ii) the secretary or some other person appointed by the Board for the purpose. The two directors or their attorney and the Secretary or other person appointed by the Board shall sign the share certificate. It is also provided that if the composition of the Board permits, atleast one of the aforesaid directors shall be a person other than a managing or whole-time director. The above director is allowed to sign a share certificate by putting his signators by means such as lithography or engraving in metal; but not by means of rubber stamp. The director so signing is responsible for the safe custody of such appliance.

6. Entries in the Register of Members: Whenever a share certificate is issued, all particulars, as specified in the "Form" set out in the appendix to the "rules" must be entered in the register of members. All entries made in the Register of Members or pending the Renewed and Duplicate Certificate must be authenticated by the Secretary or such other person as may be appointed by the Board for purposes of sealing and signing the share certificates.

7. Certificate to be Machine numbered etc.: All share certificate forms must be printed and consecutively machine numbered on the authority of a resolution of the Board. The forms and the blocks, engraving etc. relating to the certificates must be under the safe custody of the Secretary or such other person as the Board may authorize for the purpose.

8. Preservations of Books and documents in connection with certificates: All books and documents relating to the issue of share certificates have to be preserved permanently. The Managing Director or Manager and where the company has none of them, every director or the company shall be responsible for the preservation and safe custody of these books and documents.

9. Cancellation: Certificates which have been surrendered to a company must immediately be defaced by a "Cancellation Mark" and may be destroyed on the expiry of three years from the date on which they are surrendessed, under the authority of resolution of the Board and in the presence of a person duly appointed by the Board in this behalf.

Procedure for Re-issue of Share Certificates

After the work of writing up the Register of members has been completed, the Secretary's office takes up the work of preparing the share certificates and making them ready for delivery. The form usually has two parts: (1) The counterfoil and (2) the Certificate proper, each part being separated by perforations. The serial numbers of the forms must be machine printed on both the parts. The forms may be bound in book form or in loose-leaf form. The Staff of the Secretary's Office will fill up both the parts of each share certificate form with the required details. When completed these are checked by the auditors of the company. As soon as the certificates are ready for signature and sealing, a Board meeting is convened to pass a resolution authorizing the sealing and signature of the certificates and their issue by the Secretary. Each certificate must bear the company's seal and signed by atleast two directors, as authorized by the Board resolution, and countersigned by the Secretary.

Then the Secretary either arranges to despatch the certificates by registered post. or issues a circular to all shareholders informing them that share certificates are ready for delivery and requesting them to take delivery of the same on production of the letter of allotment and receipt for allotment money, either personally or through an agent. When shares are held jointly by more than one person, the certificate is delivered to the joint holder whose name is first on the application for shares. When a share certificate is lost or destroyed, the shareholder concerned may obtain a duplicate certificate on making a formal application to the company, along with the requisite fee, and supplying evidence of ownership and a Letter of Indemnity and Guarantee in proper form.

Procedure for Issue of Duplicate Share Certificate

No share certificate shall be issued either in exchange for those which are sub-divided or consolidated or in replacement of those which are defaced. Torn multilated or worn out, or where the pages in the reverse for recording transfers have been fully utilized, unless :

1. the consent of Board is given in case of loss or destruction of certificate.
2. the certificate in lieu of which it is being issued is surrendered to the company and is cancelled.

3. payment of fees for issue of duplicate certificate is made by the shareholders (not exceeding Rs. 2 per share certificate).

4. Proper evidence and indemnity to the satisfaction of the company is furnished ;

5. Out-of-pocket expenses estimated to be incurred by the company in investigating the evidence, as the Board may think fit, are deposited with the company, in case of lost or stolen share certificates, the cost of public notice shall also to be borne by the members ;

6. the words "Duplicate issued in lieu of share certificate No........... /sub-divided/replaced/lost/consolidation of shares (as the case may be)" are rubber stamped on its face and also on the counterfoil.

7. multilated defaced or torn certificates surrendered shall be defaced by a 'cancellation' mark and destroyed after three years with the authority of Board.

Duties of Secretary regarding issue of Share Certificates

The Steps to be taken by the Secretary in connection with the issue of share certificates may be enumerated as follows:

(i) He has to arrange for the printing of the share certificates under the authority of a Board resolution and for keeping them under safe custody.

(ii) He has to see that both the parts of each share certificate are written up from the Register of Members. He has also to arrange for their checking by the auditors of the company and make them ready for signature and sealing.

(iii) He has then to see that a Board meeting it convened to pass a resolution authorising the signature and sealing of the certificates and their issue by the Secretary.

(iv) He has to see that each certificate bears the Company's seal and is signed by atleast two directors and countersigned by himself.

(v) He has then to issue a circular to all shareholders informing them that the share certificates are ready for delivery and asking them to take delivery of the same on production of letters of allotment and receipt for allotment money either personally or through an agent.

(vi) He has to see that the letters of allotment and receipts of allotment moneys are produced at the time of delivery of the share certificates. The allotment letter need not be produced where the certificates are being issued against letters of acceptance or renunciation or in case of bonus issue.

(vii) He has to see that the particulars of the share certificates are entered in the Register of Members and the entry duly authenticated.

Duties of the Secretary regarding the reissue of Duplicate Share Certificates

The steps required to be taken by the Secretary in connection with the issue of duplicate share certificate are enumerated below:

(a) Where duplicate certificate has to be issued in place of sub-divided, consolidated, mutilated, or defaced certificate:

[i] He has to see that the application for duplicate share certificate is in proper form and the requisite fee, not exceeding Rs. 2, decided by the Board is paid with the application.

[ii] He has to ensure that the old certificate is surrendered by the shareholder concerned for cancellation.

[iii] He has to arrange preparation of the duplicate certificate for issue. He should see that both the duplicate certificate and its counterpart are marked with the word "Duplicate" across the face of it by rubber stamping or punching. The words issued in lieu of share certificate No.......... etc. should also be marked on the face of the new certificate and its counterpart.

[iv] He has to sec that the old certificate surrendered to the company is cancelled by putting the word "cancelled" on the face of it by rubber stamping or punching.

[v] He has to see that the required particulars of the duplicate certificate are entered in the Register or Renewed and Duplicate Certificates, as well as the remarks column" of the Register of Members, before the duplicate certificate is sent to the share-holders.

Where Duplicate Certificate is to be issued in place of one lost or destroyed:

[i] On receipt of intimation from the shareholder concerned of the loss or destruction of the original certificate, he should take prior consent of the Board for the issue of a duplicate.

[ii] He has then to see that a statutory declaration is made by the shareholder concern stating the facts of the loss and that a letter of indemnity and bank guarantee, as required by the Board, is furnished by him.

[iii] He has to see that the requisite fee not exceeding Rs. 2 as fixed by the Board, is received from the shareholder along with the expenses of newspaper, advertisement, etc.

[iv] He should also obtain proper evidence of the loss or destruction of the original certificate and arrange for the publication of a newspaper advertisement to that effect.

[v] He should see that the words "Issued in lieu of Share Certificate No. .... " are stated on the face of the duplicate certificates and its counterpart. The duplicate certificate should also be stamped or punched with the word "Duplicate" on the face of it.

[vi] Lastly he should see that the particulars of the duplicate certificate are entered in the Register of Renewed and Duplicate Certificates as well as in the "remarks" column of the Register of members. The entries must be duly authenticated by the persons authorized by the Board for sealing and signing the share certificates.

SHARE WARRANT

A Share warrant is a bearer document of title to the specified shares. As per Sec. 114 & 115 of the Act, a public company, is authorized by its Articles, may, in respect of fully paid shares, issue under its common seal, and with the previous approval of the Central Government, a share warrant stating that the bearer thereof is entitled to the shares specified therein.

Procedure for the Issue of Share Warrants

The following are the some of the important provisions as regards the issue of share warrants:

[i] Share warrants are issued by a company when its shareholder makes request in writing and must be properly supported by evidence as the title of the person applying for.

[ii] The applicant is required to deliver his share certificates to the company before share warrants are issued.

[iii] Necessary fees and stamp duty must be paid by the applicants.

[iv] Share warrants duly signed by one authorized director and the Secretary of the company must be issued under the seal of the company and will represent such a number of shares as directors think fit.

[v] Where dividend is payable for the shares Included in the share warrants, coupons are attached to each warrants. Each dividend coupon is numbered and is payable to the bearer.

[vi] Person who presented the required coupons at the company's office will get the dividend amount as specified in the warrant.

[vii] In case share warrant is lost or defaced, the Board of director may issue a duplicate on such terms and conditions as it may think fit or on receipt of an indemnity bond.

Duties of the Secretary regarding issue of Share Warrants

The steps to be taken by the Secretary in connection with the issue of share warrants may be enumerated as follows :

[i] He has to check up the Articles to find out whether they provide for issue of share warrants.

[ii] On receipt of applications from holders of fully paid-up shares for issue of share warrants, along with the share certificates, Stamp duty and requisite fees, he has to see that Board meeting is convened to decide about the issue. A "Lodgement Ticket" is to be sent to the applicant in acknowledgement.

[iii] He has then to arrange for obtaining the approval of the Central Government to the issue of share warrants. For this purpose an application in letter form is to be sent to the Central Government giving detailed reasons for such issue, along with a list of members to whom those are to be issued, copies of the Memorandum, Articles and the last audited Balance Sheet, Minutes of the relevant Board meeting on receipt of the requisite fees.

[iv] On receipt of the Government approval, he has to check and number the applications, get the share warrant forms filled up and ready for sealing and signature.

[v] After the filled up share warrants have been checked up by the company's auditors, he has to see that a Board meeting is convened to pass a resolution, authorizing the sealing of the warrants, their signing by one or more directors and the secretary and their issue by the Secretary.

[vi] After the Share warrants are sealed, signed by the directors authorized and countersigned by the Secretary, he has to issue a circular to the applicants to take delivery of the share warrants on production of the "Lodgement Ticket."

[vii] After the share warrants have been delivered, he has to see that the names of such members are struck off the Register of Members and necessary particulars are entered therein.

[viii] He has also to see that the unused share warrant forms are kept in safe custody to prevent their misuse.

FORFEITURE OF SHARES

Forfeiture of shares consequent upon non-payment of call made by the company results in the termination of membership of a person. Forfeiture means confiscation of the shares by the company by way of penalty for non-payment of call money in respect of the shares held by a member.

Essentials of a valid Forfeiture

1. Articles must authorize the Board to exercise such power.

2. The power given to the director is in the nature of a trust and must be used bonafide.

3. The Board should pass a resolution to that effect.

4. A previous notice of 14 days to the defaulty shareholder is essential.

5. Such notice must be served to the registered address of such member.

Procedure for Forfeiture of Shares

The procedure is laid down by the Articles

As soon as the last date for payment of call money is over, the list of defaulters is prepared and placed before Board meeting. The resolution passed by the Board authorized the Secretary to send reminders to the shareholders concerned.

If these reminders do not make the defaulters to pay their call money the secretary is further authorized to send final reminder letters by registered post, 14 days' time limit is given for payment of dues on call together with interest. These letters clearly state that non-payment even at this time may compel the company to forfeit the shares held by defaulters.

Even if these strongly worded letter fail to produce any result, the Board as a last resort passed the resolution for forfeiture.

A copy of this resolution is despatched to the defaulter by registered post. The shareholder is thereby instructed to surrender his forfeited shares. But shares are rarely surrendered. A public notice is usually given in leading newspapers.

Re-issue of Forfeited Shares

Shares forfeited by a company may either be cancelled or re-issued to another person at the discretion of the Board. Generally, such shares are re-issued at a discount which cannot exceed the amount already paid on such shares. This is done by a Board resolution.

After the money due is received from the new allottee, the company executes a transfer deed and issues a share certificate, and if the iginal holder has already surrendered the share certificate, it is duly transferred, otherwise after a public notice in a newspaper, a new certificate is issued.

Review Questions

1. State the secretarial work involved in preparation and issue of original share certificates.
2. Explain the procedure for issuing share warrants.
3. Outline the secretarial procedure regarding issue of shares
4. State the procedure for re-issue of Share Certificates
5. Describe the procedure for Issue of Duplicate Share Certificate
6. What are the duties of Secretary regarding issue of Share Certificates
7. Describe the secretarial procedure regarding the issue of:

   [i] duplicate share certificate.

   [ii] forfeited shares.

LESSON – 3

TRANSFER AND TRANSMISSION OF SHARES

Lesson Outline

- Transfer of Shares
- Procedure for Transfer of Shares: (Secretarial Duties regarding transfer of Shares)
- Transfer of all Shares included in one Certificate
- Transfer of Part of the Shareholdings
- Blank Transfers
- Forged Transfer
- Checklist for scrutinizing Transfer deed (Transfer of shares in physical mode)
- Transfer of Shares by Electronic Mode
- Registration Requirements under depository
- Certificate of Registration
- Commencement of Business
- Dematerialisation
- Procedure for Dematerialisation by Shareholders
- Compliance Report
- Rematerialisation of Shares
- Steps Involved in Remat of shares
- Transmission of Shares
- Distinction between transfer and transmission of shares
- Duties of Secretary regarding transmission of chares
- Specimen Resolutions

TRANSFER OF SHARES

One of the main features of a joint stock company is that the capital of a company is divided into a number of units called ' Shares' the ownership of which is transferable. This right to transfer shares is given to the shareholders by Section 82 of the Companies Act, 1956 which states that "the shares or the Interest of any member in a company shall be movable property, transferable In

the manner prescribed in the Articles of the Company." The Articles may impose certain restrictions or lay down the manner in which shares can be transferred, but it cannot take away this right of the shareholders.

Statutory Provisions regarding Transfer

Sections 108 to 113 of the Companies Act lay down the following provisions regarding transfer of shares :

(a) Section 108 provides that a company shall not register a transfer of shares unless the instrument of transfer is on the prescribed form duly executed by the transferor or the transferee slating the name of the transferor, transferee, their addresses, occupations, if any. Such instrument must be stamped and presented to the company along with the share certificate and if a share certificate does not exist the letter of allotment must accompany the instrument of transfer. This section further lays down that if the transferee has lost the instrument of transfer which had been duly executed, the directors may register the transfer of shares on such terms as to indemnity as they deem it fit and if they are satisfied with regard to loss of the instrument of transfer.

(b) A transfer of share or other interest in the company of a deceased member made by his legal representative will also be valid, as if the legal representative had been a member at the time of the execution of the instrument of transfer (Sec. 109).

(c) The application for transfer of shares may be made either by the transferor or by the transferee. Where, however the application is made by the transferor and relates to partly paid share;., the company must give notice to the transferee. If the transferee does nut object to the registration of the transfer in his name within two weeks from the receipt of the notice, his name will be entered on the register of members, with regard to an application by the transferor or by the transferor relating to fully paid shares, no notice is required (Sec. 110)

(d) The directors have the power to refuse to register the transfer or transmission of any shares. In case of refusal, the company must send a notice both to the transferee and the transferor within two

months from the date on which the instrument of transfer was delivered to the company. Default to give this notice renders the company and every officer in default liable to a fine upto Rs. 50 for every day the default continues. The transferor or transferee or the person giving intimation of the transmission, as the case may be, may appeal to the central government against any refusal of the company to register the transfer or transmission or any failure to register or to send notice of refusal within (he prescribed time (Sec. 111).

(e) Where the Board decides to accept the transfer, the relevant share certificate should be completed for delivery and the delivery should be made within two months of the receipt of the application for transfer (Sec. 113).

Restrictions on Acquisition and Transfer of Shares

After Sec. 108, seven new Sections 10'; A to 108 G have been inserted by clause 12 of the Companies Amendment Act 1974, to put some restrictions on the acquisition and transfer of shares in a company.

Procedure for Transfer of Shares: (Secretarial Duties regarding transfer of Shares)

Subject to the provisions of Sees. 108 to 113 of the Act, the Articles of Association of the Company usually lay down the procedure for the transfer of shares. Regulations 19 to 28 of Table A, which are incorporated in the Articles of most companies, deal with transfer and transmission of shares. The procedure for transfer may be discussed under two heads:

(a) Procedure when all shares included in one certificate are to be transferred; and,

(b) Procedure when parts of the holding are to be transferred.

Transfer of all Shares included in one Certificate

When it is intended to transfer all shares included in one certificate, the instrument of transfer has to be presented to the prescribed authority (i.e. the Registrar or Companies) before it is signed by the transferor, for endorsement of the date of presentation thereon. Then the instrument is properly executed, stamped, witnessed and signed by the transferor. Thereafter, the transferor

passes on the instrument, along with relevant share certificate, to the transferee. The transferee completes it with necessity details and, e tier it is signed and witnessed, deposits it with the company along with the share certificate and requisite registration fee.

On receipt of the instrument of transfer and the share certificate the Secretary issues a ''Kutcha" acknowledging receipt of the instrument. The Secretary scrutinizes the documents to make sure that all derails are correctly given and the instrument is signed by both the transferor and the transferee. Having satisfied himself that the particulars pertaining to transfer are correct the Secretary issues a receipt called "Transfer Receipt" to the transferee in exchange for the 'Kutcha receipt', conveying that the instrument is lodged for registration of transfer subject to the approval of the Board.

The next step that Secretary will take it to issue a notice called the "Notice of lodgement of Transfer" both to the transferor and the transferee. The notice informs them that the certificate and transfer form have been lodged for transfer of shares. It further states that the objection, if any, should be communicated to the company within two weeks of the receipt of this notice.

The Secretary then enters the details of the transfer in the Transfer Register. At the same time the old share certificate is cancelled and a new share certificate is prepared for issue. Sometimes, instead of issuing a new share certificate, the transfer is endorsed on the back of the old certificate. The Secretary then places before the Board meeting, or the Committee of Transfers, where appointed, the Transfer Deed, the cancelled share certificate, the new certificate and the Register of Transfer for their approval. If satisfied, the Board or Committee passes a resolution approving the transfer and authorizing the cancellation of the old certificate and issue of the new certificate. The transferee is (hen informed of this fact and is asked to take delivery of the new share certificate against the Transfer Receipt issued to him.

Transfer of Part of the Shareholdings

A company usually issues only one share certificate for all the shares held by one person. When shares are to be sold to another person, the share certificate has to be attached with the instrument of transfer. If the holder of the share certificate wants to sell part of his shareholding, the procedures for transfer will be different. The procedure is divided into the stages, (a) certification and (b) Registration.

(a) Certification of Transfer of Shares : Sometimes a member holds a number of shares but wishes to transfer a few of them. The share certificate indicates the total number of shares held by the member. In such a case the instrument of Transfer, or the Transfer Deed or Transfer Form, as they are known by different names, together with the share certificate is sent to the Secretary of the Company. The Secretary will certify on the back or in the left band margin of the instrument of transfer that share certificate for so many shares has been lodged with the company. He wilt retain the share certificate and return the instrument of Transfer duly certified by him to the member. This instrument of Transfer new is handed over to the buyer of the shares. For the remaining shares which have not been sold the Secretary will issue what is called a "Balance Receipt" or the "Balance Ticket". It is a sort of receipt which confirms that a certificate has been received out of which so many shares have been transferred and the transferor is entitled to the balance shares. The transferor can sell these shares on the strength of toe Tickets. The transferor retains the Balance Ticket and passes on the certined instrument of transfer to the transferee. The transferee, in his turn completes the instrument and deposits it with the company for registration, after it is signed and witnessed, along with the registration fee.

(b) Registration of Certified Transfer

On receipt of the certified instrument of transfer, the Secretary will conduct a detailed Scrutiny of the instrument and, if satisfied, issue a Transfer Receipt to the transferee. Particulars of the certified transfer are also entered in a Register of Certified Transfers, and a new share certificate is made ready for issue to the transferee. The Secretary then places the instrument of transfer along with the Register of certified transfer. Cancelled share certificate and new certificate before the Board or Committee for approval of the transfer. When the necessary approval is obtained, the Secretary arranges the sealing and signing of the new Certificate and informs the transferee to take delivery of the same on production of the Transfer Receipt.

Blank Transfers

When a shareholder signs the instrument of transfer without filling in the name of the transferee and the date of execution and bands it over with the share certificate to the transferee thereby enabling him to deal with the shares, he said to have made a "blank transfer". In other words, in a blank transfer, the seller

only fills in his name and signs it. Neither the buyer's name and signature nor the date of sale is filled in the transfer form, the transferee's name, etc is entered only when the transfer is to be actually registered. Before the instrument of transfer is signed by the transferor and before any entry is made therein, is shall be presented to the prescribed authority appointed by the Government. Such authority shall put on the instrument the date of its presentation of instrument before him. This instrument will then be executed by the transferor and the transferee and completed in all other respects and delivered to the company for registration.

It must be noted that the blank transfers are not negotiable instrument, and therefore, a bonafide purchaser of shares from a person who is in possession of them by fraud, does not acquire a good title to them.

Blank transfer can be made use of when the holder wants to borrow money against the security of the shares. He can give the blank transfer along with the share certificate to the banker or lender as security against the loan. If the borrower fails to repay the loan, the lender can realize the security.

(i) By completing the transfer form in favour of a purchaser of the shares for value, or

(ii) By inserting his own name in the blank transfer as the transferes and getting the shares registered in his own name.

To prevent the circulation of such blank transfer forms for unnecessary long time S. 108 (1-A) lays down that such a blank transfer form in respect of shares listed with a recognised stock exchange should be presented to the company for registration within two months after the transfer deed had been previously stamped by the prescribed government official or before the date of closing the books of account for the first time whichever is later. In other cases the instrument duly executed has to be delivered to the company for registration, within two months from the date of the stamping of the blank transfer form by the Government Official or the appropriate official as the case may be. The transferee can get his name registered even after the death of the transferor. Thus the lender of money or the buyer of shares need not sign two forms if they want to sell these shares again later on. In case of blank transfer, the name of the borrower still remains on the register of members but the lender of money can attend meetings and vote unless other arrangement is made between the parties.

It should not be presumed by reading the above paragraphs that the black transfer forms are used only when money is borrowed. Such forms are used even when shares, are sold and purchased. The underlying idea is that the shares may pass hands without filling the transfer forms whenever the shares arc sold and purchased several times. Moreover the transfer fee has not been paid every time when the shares arc sold but it is paid by the last holder of the transfer form who wishes to get his name registered and to get the share certificate in his name.

Transfers during Winding op

Any transfer of shares made during the winding up of the company is void, unless it is made with the sanction of the court in case of winding up by the court or under its Supervision, and with the sanction of the liquidator in case of voluntary winding up.

Forged Transfer

A Forged transfer is a nullity eventhough it may have been registered by the Company. The alleged transferee (i.e. the transferee who has forged the signature of the owner of the shares as transferor) does not get any title to the shares. If the registration was obtained by misrepresentation, the original shareholder continues to be the owner of the shares. But the company does not incur any liability in damages to the shareholder by putting the name of the transferee on the register of members. If however, the company issues a certificate and any person on the faith of it suffers damages, the company will be liable although the company will be entitled to damages from the person who procured registration by the forged transfer.

Checklist for scrutinizing Transfer deed (Transfer of shares in physical mode)

Before giving effect to any transfer of shares it is to be seen whether the transfer deed is properly filled or not. For assuring such correctness one has to prepare a list of the items which are to be checked and such a list of items is known as 'checklist'.

A checklist for scrutinising a transfer deed should ensure

- whether the instrument is given in prescribed Form 7B;
- whether the instrument is properly dated and whether the date of execution of instrument falls on the said date or subsequently;

- whether the instrument has been presented to the company within the validity period;
- whether the instrument has been lodged with the company within the date extended, if any, by ROC;
- whether the signature of the transferor agrees with the specimen signature registered with the company;
- when the signature of the transferor on the transfer deed does not tally with the specimen recorded with the company, the documents have to be returned for obtaining fresh signature of the transferor;
- whether the instrument has been duly stamped and cancelled as per provisions of the Indian Stamp Act, 1899 as amended from time to time. At present the stamp duty on transfer deed of shares is @ fifty paise for every hundred rupees of consideration;
- whether the transferee has signed the transfer deed and has given his specimen signature;
- whether the share transfer deed is accompanied with share certificate or letter of allotment;
- whether the distinctive number of shares as per the share certificate are the same as mentioned in the transfer deed;
- whether the shares proposed to be transfered stand in the name of the transferor in the register of members;
- in case when the transfer deed has been executed by an Attorney, whether the power of Attorney has been seen and found in order;
- if the transfer is proposed in favour of a minor whether the Articles permit such transfer;
- in case when either/the transferor or the transferee is a NRI whether permission of the RB1 has been obtained, if required;
- when the transfer is in favour of a minor/Karta of HUF/Partnership Firm/Trust, whether the deed is executed by the person authorised to do so;
- where the transfer is in favour of a company, whether the memorandum has been checked for the power to invest and whether authority to sign the instrument has been furnished by way of Board resolution;

- whether the instrument is complete in all other respect, *i.e.,*
    - properly witnessed; and
    - occupation and address of the transferee duly given;
- in case the transferee is a bank, whether general power of Attorney is enclosed;
- where the shares are attached by any Government authority and if so, whether the deed has been signed by such authority;
- Where the transfer is as per section 108A or 108C, whether the Central Government's approval has been obtained.

Transfer of Shares by Electronic Mode

On September 20, 1995, the Depositories Ordinance, 1995 was promulgated by the presidential order to provide for legal framework for settings up of depositories to record the ownership details in book entry form. Later, on November 28, 1995 the Government introduced in parliament the Depositories Bill, 1995 to replace the said ordinance. The Bill has now become an Act. The depositories Act provides for an alternate mode of effecting transfer of shares. Investor will, however, have the choice of continuing with existing share certificates and adopt the existing mode of effecting their transfer.

Transfer of shares in the dematerialised form can be either inter-depository participants (inter-DPs) or intra-depository participants (intra-DP). In both cases the transfer is effected when selling client submits a request to the Depository for transferring balance (of shares) from his account to another account. After checking signature, identity etc. of the selling client, the selling client's (transferor's) account will be debited and the buying client's (transferee's) account will be credited. No stamp duty is payable on the transfer of shares in the dematerialised form.

Meaning of Depository

As per Section 2(e) of the Depositories Act, 1996, Depository means a company formed and registered under the Companies Act, 1956 and has been granted a certificate of registration under section 12(1A) of the Securities and Exchange Board of India Act, 1992 (SEBI Act). As per the said section 12(1A), no depository shall buy or sell or deal in securities except under and in accordance with conditions of the certificate of registration issued by SEBI. Depository is the main stream of the system who does all the work relating to the

system and is the focal point of the modalities of the total phenonmenon. The Depositories working in India include National Securities Depository Ltd., (NSDL) promoted by IDBI, UTI and NSE and The Central Depository Services India Ltd., promoted by LIC, GIC and stock exchanges.

Participant

As per section 2(g) of the Depositories Act, 1996 participant means a person registered under section 12(1A) of the SEBI Act. He is the person who acts as the brokers / intermediary between the depository and the beneficial owner of the securities. All transactions relating to sale/purchase of securities are to be passed through the participant. In fact, a participant is the actual broker who deals with the securities.

Beneficial Owner

As per section 2(a) of the Depositories Act, 1996, beneficial owner is a person whose name is registered as such with a depository participant. He is the actual shareholder.

Sponsor

Regulation 2(g) of the Regulations, defines as any person who acting alone or in combination with any other person, proposes to establish a Depository and undertakes to perform the obligations of sponsors under the Regulations.

Registration Requirements

As per regulation 3 of the Regulations, an application in Form 'A' specified in the said Regulations shall be made to SEBI by the sponsor for grant of certificate of registration. The application is to be accompanied by the fee specified in part A of the Second Schedule to the Regulations (Rs. 50,000 at present) and shall be paid by demand draft payable to 'Securities and Exchange Board of India at Mumbai.

Certificate of Registration

After considering the application and on being satisfied with the clarification given to the objections, if any, the Board may grant a certificate of registration to the depository in Form 'B' specified in the Regulation.

Commencement of Business

As per section 3 of the Depositories Act, 1996, no depository shall act as a depository unless it obtain a certificate of commencement of business from the SEBI. The SEBI shall not grant any such certificate unless it is satisfied that the depository has adequate system of safeguards to prevent manipulation of records and transactions. After making physical verification wherever necessary the Board may if satisfied shall issue the certificate of commencement to the depository.

DEMATERIALISATION

Dematerialisation is a process by which physical certificates of an investor are converted into electronic form and credited to the account of the depository participant.

Procedure for Dematerialisation by Shareholders

For the purpose of dematerialisation of shares one has to follow the following procedures:

(a) To open an account with any Depository Participant (DP) by filling account opening form available with the DP.

(b) To enter into an agreement with the DP as to the rules and regulations governing their relation.

(c) The DP will give one client ID number to each client which would be used by the investor in all correspondence with the DP and the company. All shares transacted by the investor shall be accounted for in the said client ID number.

(d) To fill a dematerialised request form (DRF) with the DP and submit the relative physical share certificates along with the DRF to the DP.

(e) The DP will send the DRF to the company together with the physical certificates and simultaneously inform or update the system of the depository by electronic mode (CDSL or NSDL) where the DP is a member through electronic media.

(f) The company will verify the form, the physical certificates, signature of the investor, and if everything is in order confirm the same to the Depositories (NSDL or CDSL) as the case may be. It shall simultaneously cancel the physical certificates with due mark as "Dematerialised".

(g) The NSDL or the CDSL shall then confirm the same and credit the account of the DP.

(h) The DP will credit the account of the client on receiving the confirmation with the number of shares so dematerialised.

(i) The DP will give a periodic statement of holdings and update the account of each client for each transaction.

Compliance Report

The following compliances are to be made by the company:

(a) To give weekly report to SEBI of the shares received for demat and shares dematted.

(b) To give monthly report of the shares dematted to the stock exchanges where the company's shares are listed.

(c) To give NSDL quarterly a certificate of compliance of the aforesaid requirements.

Rematerialisation of Shares

It is a process by which the holding of investor held in electronic form is converted back to physical certificate. On receiving of electronic holding of shares into paper from, in consultation with the depository, the company will issue new share certificates in paper form with a new range of certificate No (s) against the share held by the shareholder in the electronic form. The shareholders have an option to rematerialise past of the securities held in electronic form. This process of rematerialisation will at the maximum take 30 days.

Steps Involved in Remat of shares

a. Beneficial Owner request for rematerialisation

b. Depository participant intimates the depository of the request through the system.
c. The Depository confirms rematerialisation request to the registrar.
d. Registrar updates accounts and prints certificates and confirms to the Depository.
e. The Depository updates accounts and downloads details to depository participant.
f. Registrar despatches certificates to investor.
g. Intimation to the investor from the depository participant.

Transmission of Shares

When the title of property in shares gets transferred by operation of law, and not by sale by the original owner, it is called "Transmission". In the event of death, bankruptcy or lunacy of the original members the title in the shares held by him automatically passes on to his legal representative by the operation of law. In the case of death, the title passes on to his legal heir on the executor / administrator of his estate. In the case of bankruptcy, it passes to the official assignee and to case of lunacy to the guardian appointed by the court.

Generally the articles of the Company provide rules and regulations for the transfer of shares in such cases. However, if the articles are silent Regulations 25 to 28 of table A will be applicable. The Articles of the Company should not be contradictory to these Regulations. These Regulations provide

(1). That in the case of a soleholder of shares, it is the legal heir of the deceased shareholder who is entitled to the shares belonging to the deceased shareholder.

(2). That in the case of joint shareholders it is the surviving joint holder or holders who are entitled to the shares of the joint holders.

(3). That in the case of lunacy of the shareholder, it is the court or the guardian appointed by the court, etc. who are entitled to the shares of the lunatic; and

(4). In case where the company is the shareholder and it goes into liquidation or is being woundup, it is the liquidator who is entitled to the shares held by the company under liquidation.

When the shares of the deceased, joint shareholders, lunatic or the company in liquidation are to be transferred to the persons entitled to, as enumerated above, the process of transfer is called transmission of shares.

Distinction between Transfer and Transmission of Shares

(1). Transfer of shares is a voluntary act between the holder of the shares and the transferee while in the case of transmission it is the result of the operation of law.

(2). The transfer of shares is the normal method of transferring shares while transmission takes place after the death, lunacy, bankruptcy or liquidation of the company holding the shares of another company.

(3). A transfer form has to be executed and signed by the transferor and the transferee while in the ease of transmission no transfer form has to be executed and consequently no transfer fee has to be paid as in the case of transfer of shares.

Duties of Secretary regarding transmission of chares

The duties of the Secretary in connection with the transmission of shares may be enumerated as follows :

[i] He has to scrutinize the 'Letter of Request' received from the legal representative (Executor, Administrator or Guardian) to see whether it has been properly drawn up. He has also to ensure that the required transmission fees, if any, are paid along with the 'Letter of Request'.

[ii] He has to ensure that the relevant share certificate and documentary proof of title have been attached to the letter of request. He has to see that the letter of probate or Administration received from the legal representative of the deceased member, or the documentary proof of the appointment of official Receiver or Assignee (in the case of insolvency) and Administrator or Guardian (in the case of lunacy) have been issued by a competent court and are in order.

[iii] In the case of a deceased member, he must inform the Controller of Estate Duty about the death and furnish the particulars under Sec. 20A and 84 of the Estate Duty Act and Rules 28, 29 and 29A of the Estate Duty Rules, within three months of the knowledge of such death.

[iv] He should also ensure that the legal representative of the deceased member has complied with the provisions of the Estate Duty Act and has paid the required estate duty, if any.

[v] If all the requirements have been fulfilled, he then has to arrange for convening a Board meeting for getting the transmission approved by the Board.

[vi] He then has to enter the name and other particulars of the legal representative, in the Register of Members, cancel the old certificate and prepare a new one and inform the legal representative of the fact and ask him to take delivery of the new share certificate.

[vii] Finally he should enter the contents of the letter of probate or Administration, succession certificate etc., in the Register of Probates.

[viii] If the legal representative of the deceased, insolvent or insane member elects to transfer the shares to another person, the secretary should see that a properly completed instrument of transfer is lodged along with the share certificate and other documents of title together with the required stamp duty and transfer fees. He will then follow the usual procedure for transfer of shares.

[ix] If the legal representative neither elects to register himself as a member nor to transfer the shares to some other person, the secretary should bring the matter before the Board and, if authorized, issue a notice to the legal representative directing him either to get himself registered as a member or to transfer the shares. If this direction is not complied with within 90 days, he should take steps to withhold payment of dividends, etc,, on these shares.

Specimen Resolutions

Resolution for printing of Share Certificate forms

"RESOLVED that…… number of forms of Share Certificate be printed as per draft approved and the forms be consecutively machine numbered from No……to No……(inclusive).

"RESOLVED further that all blank Share Certificate forms, blocks, engravings, facsimile relating to the forms be kept in the custody of Shri……,

Secretary, the person hereby appointed for the purpose, and he shall be responsible for rendering full account of these forms, etc., to the Board."

Forfeiture of Shares

"RESOLVED that the registered holders of……Equity Shares of Rs:……each, as shown in the list below, having failed to pay the call of Rs……per share due on……and having failed to comply with the final notice dated……served upon them, the said shares be, and they are hereby, forfeited."

Rejection of applications for Shares

"RESOLVED that the applications for allotment of shares in the company listed below, having been duly considered, be and they are hereby, rejected and the secretary of the company be, and he is hereby, directed to inform the applicants of such rejection and to return the amounts received by the company from these applicants as application money."

Issue of Share Certificates

RESOLED THAT the share certificates numbered .... to ....be issued to persons whose names appear in the list of members as placed before the meeting in accordance with the provisions of the companies (Issue of Share Certificates) Rules, 1960 under the common seal of the company signed by any tow directors of the company along with the counter signature of the Secretary of the company.''

Transfer of Shares

RESOLVED THAT pursuant to the provisions of Section 108 of the Companies Act, 1956, the share transfer of .... equity shares (Nos. .... to ....) form Mr. .... as transferee be and is hereby approved.''

Issue of Duplicate Share Certificates

RESOLVED THAT where the company has received from Mr............. , a request for the issue of duplicate share certificate in lieu of the original certificate, as having been lost and an indemnity bond been executed in favour of the company, a duplicate share certificate for .... shares of Rs, ... each numbered .... to ....(both inclusive) be issued to the said applicant under the common seal of the company in accordance with the companies (Issue of Share certificate) Rules, 1960, under the signature of any two Directors of the company and the Secretary of the company."

Review Questions

1. What is meant by Transfer of Shares? State Procedure for Transfer of Shares.
2. Give a checklist for scrutinizing Transfer deed (Transfer of shares in physical mode)
3. Describe the procedure for Transfer of shares by Electronic Mode
4. What are the Requirements for Registration under depository?
5. What is Dematerialisation? Describe the Procedure for Dematerialisation by Shares.
6. What is Rematerialisation of Shares ? State the Steps Involved in Remat of shares.
7. What is Transmission of Shares ? Distinction between transfer and transmission of shares.
8. What are the Duties of Secretary regarding transmission of chares?

UNIT III

LESSON - 1

APPOINTMENT OF DIRECTORS

Objective

After reading this unit, the students should be able to understand the Procedure for the Appointment, Re-appointment, Removal of Directors including Managing and Whole-time Directors, Managers, Company Auditors and Sole Selling Agents.

Lesson Outline

- Position of Directors
- Disqualifications for being appointed as a Director
- Increase in Number of Directors Requires Government Sanction
- Appointment of Directors
- Appointment of First Directors
- Appointment under Articles
- Restriction on appointment under Articles
- Appointment of Subscribers as First Directors
- Appointment of Subsequent Directors
- Appointment by Company in General Meeting
- Appointment by Company in Annual General Meeting
- Appointment by Board of Directors
- Appointment as alternate director
- Appointment by Third Parties
- Appointment by Central Government
- Appointment without approval of Central Government

Definition of Director

The Act makes no attempt to define a director other than to state in the statutory definition i.e. Sec. 2 (13) that a "director includes any person occupying the position of a director, by whatever name called ". Directors

collectively are called as "Board of Directors". Section 291 expressly vests .the management of the business of a company in its directors.

In larger companies, different type of directorships may exist within a single Board there may be managing or whole-time directors who in addition to their directorship will usually have a service contract with the company and will after he regarded as employees of the company. Such directors are called executive directors. There may also be worker directors who are appointed to represent the company's employees.

Position of Directors

The position of a director has not been clearly defined by the Companies Act. As was observed by B Wen LJ, "Directors arc described sometimes as agents, sometimes as trustees and sometimes as managing partners. But each of these expressions is used not as exhaustive of their powers and responsibilities, but as indicating useful points of view from which they may for the moment and for the particular purpose he considered". The directors thus act as trustees in so far as they are the guardians of the money and property of the company. They act as agents in so far as they act on behalf of the company in all matters and represent the company to the outside world. They are also managing partners in the sense that they are responsible for the management of the company's affairs.

Number of Directors

Every Public company must have atleast 3 directors and every other company including deemed to be Public Company u/s 43A) must have atleast two directors (Sec. 252). The Act does not fix any maximum number. Subject to this statutory minimum number of directors, the articles of a company may prescribe the maximum and minimum of directors, for its Board. Within the limits prescribed by the articles, the company may reduce or increase the number of its directors by an ordinary resolution in general meeting (S. 258).

In the case of a public company or a private company which is a subsidiary of a public company or deemed to be public company by virtue of Section 43-A any increase beyond the maximum limit fixed By the articles must be approved by the Central Government except where the increase in the number of directors docs not make the total number of directors more than twelve (Sec. 259).

Only individuals can be appointed directors. A body corporate, association or firm cannot be appointed directors (S. 253). Generally speaking, no qualification is required to be a director other than the holding of whatever number of shares (if any) the articles of the company fix as a requirement for a director (S. 270). It has not been decided by any Indian Court whether a minor can be appointed as a director. The statutory disqualifications mentioned below include unsoundness of mind The following persons are disqualified by the Act from being directors of a company.

Disqualifications for being appointed as a Director

A person shall not be capable of being appointed director of a company, if

(a) he has been found to be of unsound mind by a court of competent jurisdiction and the finding is in force ;

(b) he is an undischarged insolvent;

(c) he has applied to be adjudicated as an insolvent and his application is pending;

(d) he has been convicated by a court for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than 6 months and a period of 5 years has not elapsed from the date of expiry of the sentence;

(e) he has not paid any call in respect of shares of the company held by him, whether alone or jointly with others and 6 months have elapsed from the last day fixed for the payment of the call; or

(f) an order disqualifying him for áppointment as director has been passed by a court in pursuance of Sec. 203 and is in force, unless the leave of the court has been obtained for his appointment under that sections (Sec. 274).

The Central Government is empowered to remove the disqualification incurred by any person by virtue of Clause (d) or (e) specified above. Private company may provide additional grounds for disqualification:

A private company which is not a subsidiary of a public company may, by its articles, provide that a person shall be disqualified on any grounds in

addition to those specified above. For example, it may provide that a person who does not bold a post-graduate degree shall not be appointed as a director in it.

Increase in Number of Directors Requires Government Sanction (Sec. 259)

In a public company or its subsidiary private company, any increase in number of maximum directors shall not have any effect unless it is approved by the Central Government and it shall become void if and in so far as it is disapproved.

Exceptions

The aforesaid approval of the Central Government is not required :

[i] In the case of a company in existence on July 21, 1951, if the increase is within the permissible maximum under its articles as in force on the date;

[ii] In the case of any other company, if the increase is within the permissible maximum under its articles as first registered;

[iii] In the case of a company whose permissible maximum number of directors under its articles is twelve or less, if the increase in number of its directors does not make the total number of its directors more than twelve ; and

[iv] In the case of an independent private company.

Appointment of Directors

The appointment of directors in a company is regulated by a host of provisions contained in the Companies Act, 1956, and its articles of association. These provisions provide for the appointment of directors on its incorporation and thereafter. The directors appointed on incorporation of a company are known as its "first directors" and those appointed thereafter a»e known as "subsequent directors". The various ways in which the "first directors" and "subsequent directors" in a company may be appointed are given below :

Appointment of First Directors

The first directors of a company are appointed under the provisions of its articles of association. If the articles of a company are silent on this point, then, the subscribers to its memorandum of association are deemed to be its first directors. The methods of appointment of first directors are elaborated below :

Appointment under Articles

The appointment of first directors in a company is made keeping in view the provisions of its articles in this regard. The articles, generally, either name the first directors, or prescribe the method of their appointment. Invariably, the articles name the first directors. As the articles are framed by the promoters, obviously, such names are also selected by them.

Sometimes, instead of naming the first directors, the articles of a company prescribe the method of their appointment. Regulation 64 of Table A provides the model method in this regard. It reads as follows : "The number of directors and the name of the first directors shall be determined in writing by the subscribers of the memorandum or a majority of them". If the articles of a company contain this kind of a provision, then a majority of subscribers to its memorandum (and not the quorum required for their meeting) can make such appointments at their meeting. Further such meeting must be held after the incorporation of the company. However, a valid appointment can be made even without a meeting provided all the members agree to it in writing or where the articles authorize the majority to this effect.

Restriction on appointment under Articles (Sec. 266)

A person shall not be capable of being appointed as a director of a company under the articles unless, before the registration of the articles, be has himself or through his agent authorized in writing –

(a) signed and filed with the Registrar his consent in writing to act as such director, and

(b) either -

[i] signed the memorandum for shares not being less in number or value than that of qualification shares, if any, or

[ii] taken his qualification shares, if any, from the company and paid or agreed to pay for that, or

[iii] signed and filed with the Registrar an undertaking in writing to take from the company his qualification shares, if any, and pay for them, or

[iv] made and filed with the Registrar an affidavit to the effect that shares, not being less in number or value than that of his qualification shares, if any, are registered in his name.

The above provision is not applicable in the case of (a) a company not having a share capital, (b) a private company, or (c) a company which was a private company before becoming a public company.

Appointment of Subscribers as First Directors (Sec. 254)

Where the articles of a company neither name the first directors nor prescribe the method of their appointment, the subscribers to the memorandum, who are individuals, are deemed to be its first directors. Where all subscribers to the memorandum happen to be bodies corporate it would mean that the company will have no directors unless the articles make provision to this effect. The appointment of first directors is subject to the regulations of articles in this regard- Thus, if the articles provide for any qualification shares, only those subscribers who bold such shares shall be deemed to be its first directors.

Term of Office of First Directors

The first directors of a company hold office until the members appoint directors as provided in Sec. 255 of the Companies Act, 1956 (discussed below). Such appointments are made by the members at their first general meeting held after incorporation of the company.

Appointment of Subsequent Directors

The subsequent directors in a company are appointed by the following:

(a) By Company in general meeting ;

(b) By Company in Annual General Meeting ;

(c) By Board of Directors ;

(d) By Third Parties ;

(e) By Central Government ; and

(f) By Principle of Proportional Representation.

Appointment by Company in General Meeting

The Companies Act, 1956, empowers the general meeting of a company to appoint its subsequent directors. It contemplates the holding of a general

meeting by a company after its incorporation (but before it holds the first annual general meeting) for this purpose. Section 255 of the «'id Act, provides that

[i] In the case of a public company or its subsidiary private company, unless the articles provide for the retirement of all directors at every annual general meeting, as least two-thirds of their total number shall be appointed by the members in genera) meeting as directors liable to retire by rotation (called "rotational directors"). The remaining directors, called "non-rotational directors', shall also be appointed in general meeting unless the articles provide otherwise in this regard.

[ii] In the case of an independent private company, the articles may provide the manner in which the directors are to be appointed. It may not provide for such appointment by the general meeting. But where the articles fail to provide anything in this respect the directors are to be appointed by the members in general meeting. Similarly, unless the articles provide otherwise, the directors of such a company are not subject to retirement; by rotation and, hence, can be appointed for life also.

Appointment by Company in Annual General Meeting (Sec. 256)

The articles may empower the Board to appoint additional directors under Sec. 260. Unless the articles provide otherwise, at every annual meeting held after the appointment of first directors by general meeting, one-third of the rotational directors shall retire from office. The directors to retire shall be those who have been longest in office since their last appointment. But as between persons who became directors on the same day, those who are (o retire shall be determined with reference to

[i] any agreement between them or

[ii] in absence of that, by lot.

The vacancies so caused by retirement may be filled up by the company through appointment of retiring directors or some other persons in their places.

Where annual general meeting is not held, a director liable to retire at an annual general meeting and an additional director appointed by the Board would cease to hold their offices on expiry of the maximum permissible time within which the annual general meeting ought to have been held. The logic behind this

rule is that the calling of the annual general meeting is the duty of the directors and by omitting to convene the said meeting, they cannot take advantage of their own default. The directors thus, cannot prolong the tenure of office of those directors who are to retire at the next annual general meeting and the additional directors on the Board by deciding not to convene the annual general meeting.

Other Provisions relating to Appointment at annual General Meeting

(i) Automatic Re-appointment of Retiring Directors (Sec. 256): If at an annual general meeting the place of a retiring director is not filled up and the meeting has not expressly resolved not to fill the vacancy, the- meeting shall stand adjourned till the same day in the next week, ac the same time and place, or if that day is a public holiday, till the next succeeding day which is not a public holiday at the same time and place.

Re-appointment at adjourned meeting : If at the adjourned meeting also, she place of the retiring director is not filled up and the meeting has not expressly resolved not to nil the vacancy, the retiring director shall be deemed to have been re-appointed unless;

[i] at the meeting or at the previous meeting, a resolution for the appointment of such director has been put to the meeting and was lost;

[ii] the retiring director has, by a notice in writing addressed to the company or its Board of directors, expressed his unwillingness to be reappointed ;

[iii] he is not qualified or is disqualified for appointment;

[iv] a resolution, whether ordinary or special, is required for the appointment or re-appointment by virtue of any provisions of this Act, or

[v] a motion is moved for appointment of two or more directors by a single resolution and is passed (Provision to Sec. 263(2)).

It may be noted that holding of the adjourned meeting is a condition precedent for any retiring director being deemed to be re-appointed. Accordingly, where no annual general meeting is held, there will be no question of a retiring director being deemed to be reappointed.

(ii) Right of a person other than Retiring Director to stand for Directorship (Sec. 257): A person other than a retiring director is also eligible for

appointment to the office of a director at any general meeting. Where it is proposed to appoint such a person as director, the following provisions of the Companies Act, 1956, should be kept in mind :

(a) The person concerned himself or a member of the company intending to propose him, must, at least 14 days before the meeting leave at the office of the company a notice in writing under his hand signifying his candidature for the office of director or the intention of such member to propose him as a candidate for that office, as the case may be. If the article require such a notice to be given at least 14 days before (he day of election of the directors, a notice given 14 days before the adjourned meeting where such appointment is to be made-would be a sufficient compliance of the provision. The aforesaid provisions are not applicable to an independent private company or to appointments made otherwise than by company in general meeting.

(b) On receipt of such a notice, the company shall inform its members of his candidature for that office of a director or the intention of a member to propose him as a candidate for the office, by serving individual notices on the members or by advertising the same at least 7 days before the meeting in at least two newspapers circulating in the place where the registered office of the company is located. One of the newspapers must be a publication in English and the other in the regional language of that place.

(c) Such a candidate must sign and file with the company his consent in writing to act as a director, it appointed (Sec. 264)

Where a person other than a retiring director is appointed as a director be is required to sign and file with the Registrar of Companies his consent in writing to act as such within 30 days of the appointment.

A perusal of the aforesaid provisions of Section 207 brings out the following points as well:

1. Where a member gives notice of his intention to propose a person for directorship at a meeting but fails to propose him thereat, then, unless the proposed candidate has himself given a notice as required, he will not be eligible for such appointment at the meeting.
2. A company itself may appoint a person as a director at a meeting even though the notice of intention to propose him has not been served either; by such person or any member interested in the matter.

3. Only a member having a right to vote on the appointment of a director is entitled to propose the candidature of a person.

Appointment of Directors to be voted Individually (Sec. 263)

At a general meeting of a public company or its subsidiary private company, a motion cannot be made for the appointment of two or more persons as directors of the company by a single resolution. This implies that the appointment of directors shall be voted individually. However, where a resolution that the appointments shall be made by a single resolution has Best been agreed to by the meeting unanimously, the appointments made under such a resolution shall be valid.

Appointment by Board of Directors

The Board of directors may appoint directors in following ways :

As Additional Director : (Sec. 260)

The articles of a company may empower the Board of directors to appoint additional directors. Such directors; if appointed, hold office only upto the date of the next annual general meeting of the company. However, the number of directors and additional directors together shall not exceed the maximum strength axed for the Board by the articles.

The following points may be noted in the context of an additional director:

1. The rights of an additional director are the same as that of any other director except that he holds office only upto the next annual general meeting.
2. The appointment of an additional director can be made either at Board meeting or by passing a 'resolution by circulation' but the Board must exercise this power bona-fide and not for any extraneous motive.
3. The provisions of the companies Act relating to proportion of directors who are liable to retire by rotation (Sec. 255) and right of company to vary the cumber of directors (Sees. 258 and 259) do not affect the right or power of directors to appoint additional directors. For example, where the maximum number of directors fixed by the articles is eight, and there are four rotational and two non-rotational

directors in the company, the Board may appoint a maximum of two additional directors even as non-rotational ones This, in ordinary circumstances, would have meant contravention of the provision of Sec. 255.

(b) Appointment in casual vacancy (Sec. 262). In a public company or its subsidiary private company, if the office of any director appointed by the company in general meeting is vacated before expiry of his term of office in the normal course, the resulting casual vacancy may be filled by the Board of directors in its meeting, subject to the regulations of the articles in this regard. The directors so appointed shall hold office only upto the date to which the director in whose place he is appointed would have continued to hold office.

As regards the appointment of directors in casual vacancy the following points are worth noting —

1. The Board is entitled to fill causal vacancy occurring in the office of a director appointed by the company in general meeting only but not incase of a director appointed otherwise. Thus, where a casual vacancy is filled by the Board but the director so appointed also vacates it (say, he resigns , the resulting vacancy is not a casual vacancy. The Board may, in this case, appoint an additional director if Articles permit it.

2. The Board is not duty bound to fill a casual vacancy and if it so then the number of directors in the company stands reduced.

3. The Board can fill up a casual vacancy only at its meeting. A resolution by circulation is insufficient for the purpose.

4. The benefit of re-appointment under Sec.256 is not available to a director appointed in a casual vacancy.

Appointment as Alternate Director (See. 313)

The Board of directors of a company may appoint an alternate director to act for a director (called original director) during his absence for a period of at least 3 months from the State in which meetings of the Board are ordinarily held, provided they are so authorized;

(a) by the articles, or

(b) by a resolution passed by the company in general meeting.

An alternate director shall vacate office on return of the original director to the State where the Board's meetings arc ordinarily held or when the period permissible to the original director expires. It may be noted that the benefit of re-appointment under Sec. 256 is available to the original director only and not to the alternate director.

The following points may also be noted as regards an alternate director.

1. A parson may act as alternate for more than one director. In such a case. if the articles or the resolution authorising his appointment permits specifically, the alternate will have vote for each director he represents at the Board meeting. But be would be entitled to the sitting fee only once.
2. An alternate director has the same rights, duties and liabilities as any other director. As such, he is also subject to the same disqualification, qualification shares, rules regarding vacation of office, removal, holding of place of profit, etc. as any other director.
3. An alternate director would cease to hold his office on the happening of any event which would have resulted in; cessation of office of the original director.
4. An alternate director is required to file his consent to act as such with the Registrar under Sec. 264 before accepting the directorship.

Appointment by Third Parties (Sec. 255)

The articles of a company may empower its creditors or debenture holders etc. to appoint one or more non-rotational directors in its board. However, the cumber of such directors shall not exceed l/3rd of (be total number of directors of the company. Unless the general meeting at which such a director is appointed fixes the tenure of his office, it would seem that the appointment may continue until it is terminated by a general meeting or the concerned director vacates his office, resigns or is removed.

Appointment by Central Government (Sec. 408)

The Central Government may appoint any number of persons to hold office as directors in a company if it feels that it is necessary to mike such appointments in order to prevent oppression or mismanagement in the company. Such appointments are made after the Central Government is satisfied in this regard on an enquiry :

(a) on its own motion, or

(b) on the application of not less than 103 members of the company, or

(c) on the application of the members of the company holding at least 1/10th of its voting power.

The following points may be noted in this connection :

[i] The directors appointed by Central Government are not required to bold qualification shares.

[ii] They are not liable to retire by rotation.

[iii] Such directors are not taken into account for the purpose of reckoning 2/3rds or any other proportion of the total number of directors of the company.

[iv] They are appointed for a maximum period of three years on one occasion.

Appointment by Proportional Representation : (Sec. 265)

The articles of a company may provide for the appointment of at least 2/3rds of the total number of its directors according to the principle of proportional representation whether by a single transferable vote or by a system of cumulative voting. Such appointment shall be made once in every 3 years and interim casual vacancies shall be filled in accordance with the provisions of Sec. 262, that is, by the Board of directors at its meetings. Thus Sec. 265 affords an opportunity to the minority shareholders to have their representative on the Board of Directors.

U/s 408 of the Companies Act the Central Government is also empowered to direct a company to alter its articles so as to provide for election "of directors according to the principle of proportional representation in order to prevent the affairs of the company being conducted either in a manner oppressive to any member or members of the company or in a manner which is prejudicial to the interests of the company or to public interest.

Appointment or re-appointment of Managing or Wholetime Director or Manager

Section 269, as it now stands, provides that every public company, or a private company which is a subsidiary of a public company, having a paid-up

share capital of not less than the prescribed sum must have a managing or whole-time director or manager [Sec. 269 (1)]. The prescribed sum is at present rupees one crore.

A company may appoint such managerial personnel without the approval of the Central Government so long as the appointment and remuneration are in accordance with the norms, standards and procedure set out in Schedule XIII to the Act (discussed later) and a return in the prescribed form is filed within ninety days of such appointment [Sec. 269 (2)]. Otherwise the approval of the Central Government is necessary, as before, for which an application is to be made within ninety days of the appointment [Sec. 269 (3)].

The Act enjoins the Central Government from according its approval if it is satisfied that the person appointed is not a fit and proper person for the position, or that such appointment is not in the public interest, or that the terms and conditions of such appointment are not fair and reasonable [S. 269(4)].

Under Section 317 a public company or a private company which is a subsidiary of a public company cannot appoint a person as its managing director for a term exceeding eve years at a time, but it can reappoint him to bold that office for further periods not exceeding five years on each occasion. Such reappointment, however, cannot be made earlier than two years from the date on which it is 10 come into force. By virtue of S. 388, these provisions also apply to the care of a manager. Though many provisions of the Act are applicable equally to managing directors, and whole-time directors, curiously the provision as to the period of appointment of managing directors has not beau made applicable to the whole-time directors. Therefore the-term of a whole-time director need not be limited to a period of five years. The Central Government while according its approval to the appointment of a person as a managing or whole-time director or manager may however, reduce the period for which the appointment has been made by the company, even if the period is within the statutory limit. [S.269(5)].

If the appointment is not approved by the Central Government under S.269(4), the appointee must vacate his office on the date on which the decision of the Central Government is communicated to the company and if he omits or fails to do so, he is liable to be punished with fine which may extend to five hundred rupees for every day during which he omits or fails to vacate his office (S 269(6)].

When the appointment of a managing or whole-time director or manager has been made by the company under S. 269(2) without seeking approval of the Central Government, the Central Government sue motu or on any information received by it, may refer the matter to the Company Law Board for decision if it is prima facie of the opinion that such appointment has been made in contravention of the requirements of Schedule XIII to the Act (S. 269 (7)]. On receipt of such a reference, the Company Law Board must issue a show cause notice to the company, the appointee and the director or other officer responsible for the alleged contravention as to why such appointment is not to be terminated and the penalties for contravention be imposed [S. 269 (8)].

If the Company Law Board, after giving a reasonable opportunity to the parties concerned, decides that the appointment has been made in contravention of the requirements of Schedule XIII, it may by order, so declare [S. 269(9)]. Thereupon, the company becomes liable to a fine which may extend to five thousand rupees, and every officer who is in default to a fine of ten thousand rupees, and the appointment is deemed to have terminated. Moreover, the appointee, in addition to being liable to a fine of ten thousand rupees, must refund to the company the entire amount of salaries, commission and perquisites received or enjoyed by him between the date of his appointment and the passing of such order. Failure to comply with the provisions of S. 269(10) or any direction given by the Company Law Board renders every officer of the company who is in default and the appointee, as the case may be, punishable with imprisonment upto three years and also liable to a fine upto fifty rupees for every day of default [S˙269(11)]. However, all acts done by the appointee purporting to act in his official capacity, if otherwise valid, will not become invalidated by any order made by the Company Law Board S[. 269(12)].

Appointment without approval of Central Government

As already stated, a public company, or a private company which is a subsidiary of a public company, may now appoint a managing or whole-time director or manager without the approval of the Central Government, provided the conditions set out in Schedule XIII are fulfilled. These conditions relate to the mode of appointment, the appointee's eligibility or otherwise for the appointment and his remuneration.

It may be pointed out that the persons who are ineligible for appointment as managing or whole-time directors under S 267 or as managers under SS. 384

and 385 cannot also be appointed. Further, a person who suffers from any of the statutory disqualifications making him ineligible to be appointed a director cannot obviously be appointed a managing or whole-time director.

Mode of appointment under Schedule XIII

The appointment including remuneration must be approved by a resolution of the shareholders in general meeting. Such resolution must provide a cut of ten per cent of the salary payable in the event of loss or inadequacy of profits. A certificate of compliance with the requirements of Schedule X1JI from the auditor or the secretary of the company or where the company has not appointed a secretary, a secretary in whole-time practice, must be incorporated in the return to be filed within ninety days of the appointment with the Registrar under S. 269 (2).

The Department of Company Affairs has given the following clarification in its Circular No. 3 of 1989 dated April 13, 1989 : "la terms of paragraph 1 of Part 111 of Schedule X11I of the Act, the appointment and remuneration of managerial personnel shall be subject to approval by a resolution of the shareholders in the general meeting. The said resolution in the general meeting can be passed even after the expiry of ninety days' period from the date of appointment by the board of directors, and is not required to be filed with the Registrar. so long as the resolution passed by the board of directors has already been enclosed with the said return." The return is to be filed in Form No. 25-C.

Eligibility or otherwise of the appointee under Schedule XII

A person to be eligible for appointment as a managing or whole-time director or manager must not be less than 25 years of age and over the age of 70 or the retirement age, if any, specified by the company, whichever is earlier. If the appointee crosses the age of 70 years during the tenure of his appointment, the Central Government's approval is not required. He must not be holding any such office in any other company or be a managing partner of a firm or in whole-time employment anywhere. He must be a citizen of India, and also resident in India.

A person is ineligible for appointment in any such office if he had been sentenced to imprisonment for any period or to a fine exceeding one thousand rupees for the conviction of an offence under any of the following Acts, namely:

(1). The Indian Stamp Act 1899 ;

(2). The Central Excises and Salt Act 1944;

(3). The Imports and Exports (Control) Act 1947 ;

(4). The Industries (Development and Regulation) Act 1951 ;

(5). The prevention of Food Adulteration Act 1954 ;

(6). The Essential Commodities Act 1955;

(7). The Companies Act 1956 ;

(8). The Wealth-tax Act 1957 ;

(9). The Income-tax Act 1961 ;

(10). The Customs Act 1962 ;

(11). Toe Gold (Control) Act 1968 ;

(12). The Monopolies and Restrictive Trade Practices Act 1969; and

(13). Toe Foreign Exchange (Regulation) Act 1973.

A detainee under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 is also not eligible for appointment, irrespective of his period of detention.

Disability of the Company: A company cannot appoint any person in any such office in any financial year it bad suffered loss and had inadequate profits during the immediate preceding financial year or any of the three financial years in the four financial years immediately preceding the financial year.

The Department of Company Affairs in its circular No. 3 of 1989 dated April 13, 1989 has given the following illustration by way of clarification:

"Where the appointment is made during the financial year 1990, approval of the Central Government is not necessary if the profits were adequate -

[i] during the financial year 1989, being the financial year immediately preceding the financial year in which appointment is made ; or

[ii] in any of the three years out of four financial years, namely, 1985, 1986, 1987 and 1989 (being the four financial years immediately preceding the "preceding financial year"

Who cannot be appointed managing or whole-time director : The disqualifications (S c. 274) applicable to a director apply to a managing or whole-time director also. In addition, a person cannot be appointed managing or whole-time director if he —

(a) is an undischarged insolvent or has at any time been adjudged insolvent;

(b) suspends or has at any time suspended payment to his creditors or makes or has at any time made a composition with them ; or

(c) is or has at any time been convicted by a court of an offence involving moral turpitude (Sec, 267).

A person cannot be appointed managing director of more than two companies, public or private, where one at least of the two companies is a public company or private company which is a subsidiary of a public company. The Central Government may, however, permit any person to be appointed managing director of more than two companies if it is satisfied that it is necessary that the companies should, for their proper working, function as a single unit and have a common managing director (Sec. 316 (4)).

A person may, however, he appointed managing director of any number of private companies, none of which is a subsidiary of a public company.

The secretarial procedural aspects relating to appointment of directors in specified circumstances are detailed below:

1. Secretarial procedure in the case of appointment of a retiring director:

[i] The Secretary has to ensure as to whether retirement takes place in order of seniority. Ha has to make it evident before AGM which director will retire by rotation.

[ii] He has to make known to the retiring director to ensure whether he/she is willing to be re-appointed at the next AGM.

[iii] He has to convene a Board Meeting to approve the annual accounts, reports, notices and agenda in order to confirm the resolutions proposing the re-appointment of the retiring director(s) are included in the agenda itself.

[iv] To ensure that the resolution for re-appointment is duly passed at the AGM and to inform the retiring director of his reappointment.

II. Secretarial procedure in the case of appointment of a Director other than retiring director:

[i] According to Sec 257(i), a person who is not a retiring director may be appointed to the office of director at any general meeting if he or some other member intending to propose him, has not less than 14 days before the meeting, left at the office of the company. a notice in writing signifying his candidature for the office of the director or any member intending to propose his candidature with a deposit of Rs 500/-.

[ii] The Secretary has to inform the candidature or proposal to all members atleast 7 days before the meeting by individual notices or by newspaper advertisement.

[iii] He has to send copies of the notice and a copy of the proceedings of the general meeting to the 'Stock Exchange' where the company has listed its shares.

[iv] to case the person is appointed as a director, the company shall refund the deposit of Rs. 500 to the person or to such other member, who had proposed the name for directorship.

[v] the secretary has to ensure whether the person so appointed fries with the Registrar his consent to act as a director within 30 days in Form No. 29.

[vi] He has to file in duplicate particulars of appointment of director in Form No. 32 with Registrar of Companies within 30 days of his appointment.

[vii] He has to make sure that necessary entries are made in the Register of directors and Register of share holdings.

III. Secretarial Procedure in the case of appointment of an Additional Director:

[i] The Secretary has to ensure that whether the Articles of the company authorize the Board of directors to appoint additional director u/s 260.

[ii] He has to ascertain that the consent of the person proposed as alternate director is received by the company before such appointment.

[iii] He has to convene a Board Meeting to pass a resolution appointing the person as additional director till the holding of next AGM.

[iv] He has to inform the appointment to the stock exchange (s) where the company has listed its shares.

[v] He has to ensure whether the person so appointed files with the Registrar of Companies, his consent to act as a director within 30 days in Form No. 29.

[vi] He has to file in duplicate particulars of appointment of director in Form No. 32 with the ROC within 30 days of his appointment.

[vii] He has to ascertain that necessary entries are made in the Register of Directors and Register of Share holdings.

Secretarial Procedure for the appointment of an Alternate Director:

[i] The Secretary has to ensure that whether the Articles of the Company authorize the Board of Directors to appoint 'Alternate Directors' u/s 313.

[ii] Where it is proposed to appoint a person as an alternate director, the secretary has to ascertain whether the consent to act as a director has been received.

[iii] He has to convene a Board Meeting to appoint the altercate director in place of original director.

[iv] He has to inform the person concerned of his appointment as alternate director.

[v] He has to obtain particulars as required under Sec. 299. 305 and 308 from the newly appointed alternate director.

[vi] The Secretary has to ensure whether the person so appointed free with the ROC to act as a director within 30 days in Form No. 29.

[vii] He has to file in duplicate particulars of appointment of director in Form No. 32 with the ROC within 30 days of his appointment.

[viii] He has to inform the appointment of alternate director to the stock exchange where the company has listed its shares.

[ix] He has to ascertain that necessary entries arc made in the 'Register of Directors' and 'Register of share holdings'

Review Questions

1. Who can be a director? Explain the various modes of appointment of directors.
2. How are directors appointed by company in a General meeting?
3. Outline the secretarial procedure for appointment of a Managing Director.
4. Differentiate between Managing Director and Manager.
5. Explain the procedural formalities for appointment of whole-time director in a public company.
6. Who is a Nominee director? How is he appointed?
7. Explain the secretarial practice for appointment of director other than a retiring director.
8. Outline the secretarial procedure for appointment of an Alternate Director.
9. Enumerate the steps to the token by a secretary for the appointment of an Additional Director.

LESSON – 2

REMOVAL OF DIRECTORS

Lesson Outline

- ✦ Directors Ceasing to Hold Office
- ✦ Resignation by a Director
- ✦ Vacation of Office
- ✦ Removal of a Director
- ✦ Secretarial procedure in regard to removal of directors
- ✦ Sole Selling Agents
- ✦ Appointment of sole-selling Agent (Sec. 294)
- ✦ Compensation for loss of office (Sec. 294-A)
- ✦ Quantum of Compensation
- ✦ Power of Central Government to prohibit the appointment of sole-selling agents in certain cases (Sec. 294-AA)

Directors Ceasing to Hold Office

A director may cease to bold office:

(a) If he resigns from his office

(b) If he retires by rotation

(c) If he vacates his office

(d) If he is removed from his office :

[i] by General Meeting;

[ii] by Central Government;

[iii] by Company Law Board.

Resignation by a Director

A director may cease to hold office by tendering a letter of resignation. The matter is governed by the regulations contained in the articles of each individual company as the Companies Act, 1956, is silent on the point.

Unless the articles of a company provide otherwise, the resignation of a director shall be dealt with in accordance with the following established rules:

(i) If the articles provide that a director may resign at any time, the resignation tendered takes effect immediately for it requires no acceptance at all.

(ii) Where the articles so require, acceptance is essential to give effect to a resignation submitted by a director. Acceptance is also necessary where the resignation letter itself states that it is not to take effect unless accepted. However, in other cases, acceptance is not needed at all and a resignation once made takes effect immediately.

(iii) A resignation may be oral or written but the intention to resign must be clear. The articles, it is advisable, should provide for a written communication which also points out the time when it is to take effect with a view to avoiding controversies later on.

(iv) A resignation to be effective must be served at the registered office of the company or addressed or to the Board.

(v) A resignation tendered by an ordinary director or a mapping director becomes effective immediately and its acceptance by the company is not essential But the resignation of a whole-time director does not take effect unless accepted by the company for the simple reason that besides being a director, he is also an employee of the company. Consequently, to leave such office, he must hand over its charge to the company and the latter needs to relieve him of duties and responsibilities attached to such office

(vi) A resignation once made cannot be withdrawn except with the consent of the company, even if the Board has not considered it yet.

(vii) A verbal resignation accepted at a meeting becomes effective even though the articles require it to be in writing.

(viii) Unless the articles provide otherwise, a prospective resignation can be withdrawn before it has been accepted, if required, but before it takes effect.

In Abdul Huq vs Katpadi industrial Limited, Justice Ramaswami has made the following observations:

The net result of the analysis is that a director, who has submitted his resignation, will be deemed to have resigned from the date of resignation, without prejudice of course to his liabilities and obligations which had occurred up to that date and which he cannot evade by serving his connecting with the Company.

The letter of resignation should be addressed to the Company to be effective. If it is addressed to a third party (i.e. ROC) it would not be a valid letter of resignation.—Held in Registrar of Companies, Orissa vs Orissa Paper Products Limited

Retirement of a Director : A director ceases to hold office if he retires by rotation at an AGM, unless re-elected at the same meeting. Unless Articles of the Company otherwise provide at every AGM of public Company or its subsidiary private company) l/3rd of the rotational directors retire and cease to hold their office.

Vacation of Office

A director ceases to hold his office automatically in the following cases:

(i) If he fails to obtain the qualification shares within 2 months of his appointment or at any lime thereafter ceases to hold them, if any required of him by the articles of the company.

(ii) If he applies to be adjudicated, or is adjudicated, or is adjudged an insolvent.

(iii) If he is found to be of unsound mind by a competent court.

(iv) If he is convicted by a court of offence involving moral turpitude and is sentenced to imprisonment for at least 6 months.

(v) If he fails to pay any call in respect of shares held by him within 6 months, whichever is longer, without obtaining leave of absence from the Board.

(vi) If he absents himself from 3 consecutive meetings of the Board of directors or from all meetings of the Board for a continuous

period of 3 months, whichever is longer, without obtaining leave of absence from the Board.

(vii) If he (whether) by himself or by any person for his benefit or on his account, or any firm in which be is a partner or any private company in which he is a director accepts a loan, or any guarantee or security for a loan from the company without obtaining prior approval for the Central Government under Sec.295.

(viii) If he does not disclose to the Board the nature of his concern or interest in a contract or arrangement entered into or to be entered into by or on behalf of the company as required under Sec. 299.

(ix) It he becomes disqualified by an order of the Court under Sec. 203 for being guilty of an offence pertaining to promotion, formation or management of the company or being guilty for fraud, misfeasance or breach of his duty in relation to it.

(x) If he is removed by shareholders in general meeting under Sec. 284.

(xi) If he ceases to hold an office in the company by virtue of which he was appointed as a director, or

(xii) If he holds an office of profit in the company or its subsidiary in contravention of Sec. 314.

A private company, which is not a subsidiary of a public company, may add other grounds for disqualification to the above list. For example, it may provide that a person not holding a post-graduate degree in any discipline shall be disqualified for appointment as a director.

Removal of a Director

(i) By Shareholders in a General Meeting : (Sec. 284). A company may, by ordinary resolution, remove a director before the expiry of his period of office. The members intending to remove a director are required to give a notice of their intention to do so at least 14 days before the meeting at which such resolution is to be moved. On receipt of the notice, the company shall forthwith send a copy thereof to the members and to this director concerned, who shall be

entitled to be heard at the meeting. If he makes any representation to the company and requests its notification to the members, it shall be sent to the members of the company, unless it is received by it too late so as to be sent to them in time. In such an eventuality, the representation may be read out at the meeting. However, if the court is satisfied that this right is being abused to secure needless publicity for defamatory matter, it may order that the representation shall not be sent or read out, as the case may be.

Filling of Vacancy

The vacancy so caused may be filled up at the same meeting if the intention to appoint a person in his place has been given to the company at least 14 days before the meeting. Alternatively, the Board may do so under Sec. 262 as if it were a casual vacancy.

Exceptions

The shareholders cannot remove a director appointed by;

a) the Central Government under Sec. 408.

(b) a private company for life before or on April 1, 1952

(c) proportional representation under Sec, 265.

(ii) By Central Government (Sections 388 D — 388 E) The Central Government may, by order, remove any director from office if the High Court has found him to be guilty of:

(a) fraud, misfeasance, persistent negligence, breach of trust, etc, in the conduct and management of the affairs of the company, or

(b) not conducting and managing the business of the company in accordance with sound business principles or prudent commercial practices or

(c) conducting and managing affairs in a manner likely to cause or which caused injury or damage to the interest of trade, industry or business, or

(d) conducting and managing business with intent to defraud the creditor, members or any other person, or otherwise for a fraudulent and unlawful purpose, or in a manner prejudicial to public interest.

A director so removed cannot hold office of a director of any company during a period of 5 years from the date of the order of removal. The Central Government may, with the previous concurrence of the High Court, permit such person to become a director before the expiry of the said period of 5 years.

(iii) Removal by Company Law Board : On an application for relief in cases of oppression/mismanagement, the company law board may with a view to bringing to an end the matters complained of, by order terminate the appointment of the managing director or any other director (Sec. 402) without giving rise to any claims against the company by any such director for damages or for compensation for loss of office or in any other respect either in pursuance of any agreement or otherwise Sec. 407 (1) [a].

Secretarial procedure in regard to Removal of Directors

Section 284 of the Companies Act, 1956, deals with the removal of a director before the expiry of his period of office. However, the following directors cannot be removed :

(a) a director appointed by the Central Government under Section 408;

(b) a director of a private company holding office for life on the first day of April, 1952 whether or not he is subjected to retirement under an age limit by virtue of the articles is or otherwise; and

(c) directors appointed by availing of the option given under Sec. 265.

1. For the removal of a director under Section 284, a special notice is required (a special notice is also required when it is proposed to appoint a person in place of the director so removed).

2. The company shall immediately on receipt of the notice seeking removal of the director give to its members, notice of the resolution in the same manner as it gives notice of the meeting. Where this is not practicable, company has to give notice to the members either by an advertisement in a newspaper having appropriate circulation or in any other mode allowed by (he article) not less than seven days before the meeting.

3. On receipt of the notice of a resolution to remove a director, the company should forthwith, send a copy of the same to the concerned director and the director concerned, whether or not he is

a member of the company, is entitled to be heard on the resolution at the meeting.

4. Where the concerned director makes a representation in writing (subject to reasonable length) and requests circulation of the same to the members, the company is duty bound to do so, unless it is received by it too late, as stipulated by Section 284(4).

5. Forward three copies of the notice and a copy of the proceeding of the general meeting to the stock exchange where the company is listed on it.

6. The changes in company's Board of directors have also to be informed to the respective stock exchanges.

7. Form No. 32 (in duplicate) and if applicable. Form No. 29 also shall be filed with the Registrar of Companies within thirty days of the removal of a director.

SOLE SELLING AGENTS

The Companies Act 1956, does not define the term "Sole Selling Agent" It means an individual, firm or company who is given exclusive rights to sell in a particular area the goods of the company concerned. The relationship of the company and the sole selling agent is to be determined not by name but conduct of the parties. Thus, an agreement may be described as one of the seller and buyer and uses the expression 'principal to principal basis', if the tenure of (he agreement is that of appointing sole distributor for an area. There is an appointment of sole selling; agent (Snalagam Jhajharia, V. National Coal Co. Ltd. (1965) I Comp. L. J. 112 (Cal)).

Appointment of Sub-selling Agent (Sec. 294)

(i) Appointment or re-appointment to be for five years. A public or a private company shall not appoint a sole selling agent for more than five years at a time. (Sec. 294 (1)

If a sole selling agent is appointed without fixing and definite period, be cannot be continued indefinitely for any number of years. The maximum period for which he can hold office is 5 years in any case unless he is re-appointed for a further period or periods as prescribed in Section 294 (1).

(ii) Appointment of Board of directors should be subject to approval by next first general meeting. The Board of directors of a company shall not appoint a sole selling agent for any area except subject to the condition that the appointment shall cease to be valid if it is not approved by the company in the first general meeting held after the date on which the appointment is made (Sec. 294 (2)).

The Bombay High Court has in the case of Arantee Manufacturing Corporation v. Bright Bolts (P) Ltd. held that if any appointment of a sole-selling agent is made by a Board of directors without such a condition, the appointment would be void ab-initio, even though a general meeting of the company may have approved of i(. Further, the condition prescribed in Section 294 (2) "mandatory and not merely directory".

If the company in the general meeting disapproves the appointment, it shall cease to be valid with effect from the date of that general meeting (Sec. 294 (2A)). Where the appointment has become void, it is to be regarded as dead and cannot be revived by ratification at a subsequent meeting. If the agent has done some work in the mean lime, be is entitled to remuneration in respect of that work.

The formal requirement of Section 294 (2) is required to be complied with only when an appointment is made by the Board, but not where the company in general meeting makes the appointment.

(iii) Central Government's power to investigate terms of appointment. The Central Government may require the company to furnish particulars of the terms and conditions of the appointment of sole-selling agent for the purpose of determining whether or not the terms and conditions are prejudicial to the interests of the company. (Sec. 294 (2) (9)). If the company refuses or neglects to supply the information the Central Government may appoint a suitable-person to investigate and report on the terms and conditions of such appointment [Sec. 2 5(5) (b)]. If the terms and conditions of the agreement are found prejudicial to the interests of the company, the Central Government may make variations in the terms and conditions so that they are no longer prejudicial to the interests of the company [Sec. 294(5) (c)] Such variations in the terms and conditions will become effective from the date specified in the order.

Where a company has several agents in any area or areas, the Central Government may call for information as regards the terms and conditions of appointment of all such agents for the purpose of determining whether any of them should be declared to be the sole-selling agent for such area or any of such areas. [Sec. 294(6) (a)].

If the company fails or neglects to furnish the information, the Central Government may appoint a suitable person to investigate and report on the terms and conditions of the appointment of all the selling agents- [Sec. 294(6) (b)].

If, from information supplied by the company or report submitted by the inspector, the Central Government is of the opinion that a particular selling agent is, to all intents and purposes, a sole selling agent for such area, it may, by order declare to that effect with effect from the date specified in the order and may also make suitable variations in the terms and conditions of appointment of that selling agent so as to preserve and protect the interests of the company. [Sec. 294(6) (c)].

(iv) Company's duty in investigation. The Company is under as obligation to product all relevant books and papers and to give all assistance in connection with the investigation which it may reasonably be able to give. [Sec. 294 (7)].

(v) Penalty. If a company refuses or neglects to (a) furnish the Information required by the Central Government (b) to produce to the inspector, all relevant books and papers which are in its custody or power or otherwise to give all assistance in connection with the investigation which it may reasonably able to give the company and every officer who is in default shall be liable for a tine upto Rs. 5,000 and with a further fine of not less than Rs. 50 for every day after the first during which such refusal or neglect continues [Sec- 294 (8)].

Compensation for Loss of Office (Sec. 294-A)

Section 294-A (1) of the Companies Act provides that a company shall not pay or liable to pay its sole selling agents any compensation for the loss of his office in the following cases:

(i) Where the appointment of the sole selling agent is not approved by the company in general meeting.

(ii) Where he resigns because of the reconstruction or amalgamation of the company and is appointed as the sole selling agent of the reconstructed company.

(iii) Where he resigns his office for any other reason.

(iv) Where he has been guilty of fraud or breach of trust or gross negligence in the conduct of his duty as the sole selling agent.

(v) Where he has instigated or has taken part in bringing about the termination of the sole selling agency.

In other cases, the selling agent may be paid compensation for loss of office.

Quantum of Compensation

The compensation which maybe paid by a company to its sole selling agent for loss of office shall not exceed the remuneration which he would have carried if he had been in office.

(i) for the unexpired residue of his term, or

(ii) for 3 years, whichever is shorter.

The calculation will be on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which his office ceased or was terminated. Where he held the office for a lesser period than 3 years, the average remuneration shall be calculated on the basis of his actual earned remuneration during such shorter period. [Sec. 294-A (2)].

Power of Central Government to prohibit the appointment of sole-selling agents in certain cases (Sec. 294-AA)

Section 294-AA has been inserted by the Companies (Amendment) Act, 1974 under which Central Government has been empowered to prohibit the appointment of sole-selling agents in certain cases.

(i) Restriction on appointment of sole-selling agents. In the case of companies producing or supplying goods for which, in the opinion of the Central Government, the demand is substantially in excess of the supply, the Government may by notification declare that sole-selling agents shall not be appointed in respect of such goods for a specified period -(Sec 294-AA (1)).

(ii) Prior approval of Central Government. A company shall not appoint any individual, firm or body corporate having substantial interest in the company as the company's sole selling agent unless such appoint has been previously approved by the Central Government (Sec. 294-AA (2)), But if the sole selling agent acquires the 'Substantial interest' in the company subsequent to his appointment, it will not be obligatory on the company to obtain the previous approval of the Central Government for the continuance of the said appointment for the remaining duration of their current tenure but not during any extension thereof.

The powers and functions of the Central Government under the section have been delegated to the Company's Law Board.

Substantial Interest

Substantial interest means the beneficial interest held in shares of the company, the aggregate amount paid-up on which exceeds Rs. 5 lakhs or 5% of the paid up share capital of the company whichever is less, by –

(1). an individual or his relatives ;

(2). one or more partners of a firm or any relative of such partners ;

(3). a body corporate or one or more of its directors or any relative of such director. The holding may be singly or taken together. (Explanation (b) to Sec. 294-AA).

(iii) Prior approval of Shareholders and the Central Government: A company having a paid up capital of rupees fifty lakhs or more shall not appoint a sole selling agent except with the consent of the company accorded by a special resolution and the approval of the Central Government. (Sec. 294-AA (3)). But where after the appointment of a sole selling agent has been made, the company's paid up capital is increased to Rs. 50 lakhs or more, no fresh approval of shareholders by special resolution and of the Central Government is required for the continuance of said appointments for the remaining duration of their current tenure.

A company seeking approval for appointment of sole selling agents shall furnish to the Central Government such particulars as may be prescribed (Sec. 294 AA (5)).

If the company in general meeting (disapproves the appointment of sole selling agent, such appointment shall cease to have effect from the date of the general meeting. (Sec. 294-AA (7)).

(iv) Existing sole-selling agents require approval of shareholders and the Central Government. Where any appointment has been made of sole selling agent by a company before the commencement of the Companies (Amendment) Act, 1975, and the appointment is such that it could not have been made except on the authority of a special resolution passed by the company and the approval of the Central Government, the company shall obtain such authority and approval are not so obtained, the appointment of the sole selling agent shall stand terminated on the expiry of six months from such commencement. (Sec. 294-AA (6))

Sole Buying or Purchasing Agent

The provisions of Sec. 294-AA except those of sub-section (1) shall apply so far as may be to the appointment by a company of a sole agent for the buying or purchasing of goods on behalf of the company. (Sec. 294-AA (8)). It means a company shall not appoint any individual, firm or body corporate having substantial interest in the company as its sole buying or purchasing agents unless such appointment has been previously approved by the Central Government. A company having a paid-up capital of Rs. 50 lakhs or more shall not appoint a sole buying or purchasing agent except with the consent of the company accorded by a special resolution and the approval of the Central Government. If the company in general meeting disapproves the appointment of the sole buying or purchasing agent, such appointment shall cease to have effect from the date of the general meeting. A company seeking approval for appointment of sole buying or purchasing agent shall furnish to the Central Government such particulars as may be prescribed.

SPECIMEN RESOLUTIONS

Appointing a committee of directors

"RESOLVED that a Committee consisting of Shri……, Shri……and Shri……, directors of the company, be and is hereby, appointed for the purpose of admitting share transfers and transmissions in terms of the Articles of the company."

Filling up casual vacancy in the Board

"RESOLVED that Shri……of……be, and is hereby, appointed a director of the company to fill up the causal vacancy caused by the sudden demise of Late……director, and that Shri……shall be entitled to all the facilities and amenities extended by the company to other directors and that his term of office as director shall continue until the next annual general meeting."

Appointment of a Director retiring by rotation

"RESOLVED that Shri......who retires by rotation under Article......of the Company's Articles of Association, but being eligible offers himself for reappointment be, and he is hereby elected and re-appointed a director of the Company."

Increase in number a directors within maximum limits fixed under the Articles

"RESOLVED that the number of existing directors of the company be, and is hereby, increased from……to……, such increase being within the maximum limits fixed in that behalf by regulation……of the Company's Articles of Association, and Shri……and Shri……be, and they are hereby, appointed as additional directors."

Increase in number of directors beyond the limits fixed under the Articles

"RESOLVED that, subject to the approval of the Central Government, the number of existing directors of the company be increased from……to……and Shri……and Shri……be, and they are hereby, appointed as additional directors."

Removal of a Director

"RESOLVED that Shri……, director of the company, regarding whose removal special notice has been received and has been duly heard as required by Section 284(3) of the Companies Act, 1956, be, and he is hereby, removed from his office as director of the company."

Authorizing the Board to appoint an Alternate Director

"RESOLVED that the Board of Directors be, and they are hereby, authorized to appoint an alternative director in place of Shri……, a director of the company, who will be absent from the State for……months

from……to……, such alternate director to vacate his office as director as and when Shri……, the original director returns to the State."

Appointment of Managing Director

"RESOLVED that the approval of the Central Government having been received under Section 269 of the Companies Act, 1956, vide letter No…… dated……, Shri……be, and he is hereby, appointed Managing Director of the company, in terms of the provisional agreement dated……submitted to the Central Government, for a period of five years with effect from……and the said agreement be executed on behalf of the company under its common seal."

Re-appointment of Managing Director

"RESOLVED that, subject to the approval of the Central Government, Shri……be, and he is hereby, re-appointed as the Managing Director of the company for another term of five years from……on the terms and conditions embodied in the agreement proposed to be entered into between the company and Shri……, a draft whereof has been placed before the meeting and initialed by the Chairman for purposes of identification, and the Board of Directors be, and they are hereby, authorized to execute the agreement with such modifications as the Central Government may suggest and agreed to by the Board and Shri……"

Fixing the Remuneration of Directors

"RESOLVED that the remuneration of the Directors be fixed at Rs……per meeting of the Board or committee thereof and a travelling allowance of Rs……per day or first class railway fare to and from, whichever is less, for attending the said meeting."

Appointment of Secretary

"RESOLVED that, pursuant to Article…of Articles of Association of the company and all other applicable provisions of the Companies Act, 1956, Shri……, an Associate Member of the Institute of Company Secretaries of India, who has required qualifications as prescribed under the Companies (Appointment and Qualifications of Secretary) Rules, 1988, be and is hereby, appointed as the Secretary of the Company for a period of……years with effect from……20……at a remuneration contained in the draft agreement placed before the meeting and approved, and he is to perform all those duties which are

usually performed by a Secretary under this Act and any other ministerial and administrative duties as may be assigned to him."

Appointment of Additional Director

"RESOLVED that in accordance with the provisions of section 260 of the Companies Act, 1956 and in accordance with the provisions of section of article............ of the Articles of Association of the Company, Mr A, Chartered Engineer, be and is hereby appointed as an Additional Director of the company with effect from the date of this Board's meeting to hold office up to the date of the next annual general meeting."

Approval of Half-Yearly Financial Results

"RESOLVED that the unaudited financial results of the Company for the six months' period ended on 30th September, 20......, as placed before the meeting, be and are hereby approved and the same are taken on record and tht Mr. ...., the Chairman and Managing Director be and is hereby authorised to sign the same on behalf of the Board of Directors of the Company and also to get the same published in the newspapers as per the listing requirements.."

To Consider Appointment of an Additional Director

RESOLVED that in accordance with the provisions of section 260 and other applicable provisions, if any, of the companies Act, 1956 and in accordance with the provisions of Article 32(*a*) of the Articles of Association of the Company, Mr. ....be and is hereby appointed as an Additional Direction of the Company to hold office till the day of next Annual General Meeting of the Company.''

Appointment of Managing Director /Whole Time Director

Type of Resolution: Ordinary Resolution

"RESOLVED that Mr. XYZ, who conforms to the requirements of schedule XIIIof the companies Act, 1956, be and is hereby appointed as Managing Director/ Woletime Director of the company for a period of five years effective from .... and the remuneration payable by way of salary, commission, and perquisites in accordance with the provisions of he Act and as contained in the agreement placed before the meeting and initialled by the Chairman for the purpose of identification."

For appointment of managing director/manager in accordance with Schedule XIII

Authority : General meeting

Type of resolution : Ordinary resolution

'RESOLVED that pursuant to sections 198, 269, 309 and Schedule XIII and other applicable provisions, if any, of the Companies Act, 1956 and subject to the approval of the Central Government as may be necessary, the consent of the company be and is hereby accorded to the appointment of Mr. A as managing director of the company for a period of 5 years with effect from April 1, 2000 at the remuneration and perquisites and upon and subject to terms and conditions set out in the agreement entered into between the company and Mr. A.

RESOLVED further that the Board of Directors of the company be and is hereby authorised to vary, increase, modify and alter the remuneration and perquisites including the monetary value thereof in such manner as may be agreed to between the Board of Directors and Mr. A within and in accordance with and subject to Schedule XIII to the Companies Act, 1956 or any amendment thereto and as may be stipulated by the Central Government and agreed to accordingly between the Board of Directors and Mr. A.

RESOLVED further that the Board of Directors of the company be and is hereby authorised to take such steps as may be necessary to give effect to this resolution.'

Explanatory statement pursuant to section 173(2)

Pursuant to sections 198, 269, 309 and Schedule XIII and other applicable provisions of the Companies Act, 1956, the Board of Directors of the company has appointed Mr. A as the managing director of the company with effect from April 1, 2000. Mr. A's appointment as managing director is at the remuneration of and perquisites and subject to the terms and conditions set out in the agreement entered into between the company and Mr. A. The Board has the power to fix remuneration and to make such variation or increase therein as may be thought fit from lime to time subject to the provisions of the Companies Act, 1956. Mr. A's appointment as managing director and remuneration and other terms and conditions as contained in the said agreement are subject to the consent of the members.

The directors recommend the resolution for approval of the members

The agreement relating to the appointment of Mr. A will be available for inspection at the registered office of the company between 10 a.m. to 12 noon on any working day and shall also be available at the meeting.

None of the directors except Mr. A is interested or concerned in this resolution.

Review Questions

1. Under what circumstances a director is removed from the office.
2. Explain the secretarial procedure for removal of director by share holders.
3. When does resignation the director take effect?
4. Describe the procedure for appointment of sole selling agent.

UNIT IV

LESSON - 1

COMPANY MEETINGS - I

Objective

After reading this unit, the students should be able to understand Calling and Conducting Meetings of Board, its Committees, Shareholders and others, Post Meeting Formalities including Writing of Minutes, Specimen Notices and Resolutions, Directors Responsibility Statement and Compliance Certificate.

Lesson Outline

- Essentials of a valid meeting
- Proper authority to convene a Meeting
- Secretarial duties regarding notice of company meeting
- Quorum
- Rules regarding quorum in general meeting
- Secretarial duties regarding quorum in Company Meeting
- Preparation of Agenda
- Secretarial duties regarding Agenda of Company Meeting
- Chairman of a Meeting
- Powers and Duties of Chairman
- Secretarial Duties in connection with Meeting
- Duties of the Secretary at the Meeting
- Duties of the Secretary after the Meeting

INTRODUCTION

A company means a voluntary association of persons for some common purpose. The proper functioning of any association of persons, large or small, requires that the member of the association come together from time to time to discuss matters of common concern and take decisions by common consent or by the consent of the majority. Meetings are therefore, essential for any type of association.

Definition

A meeting may be defined as any gathering, assembly or coming together of two or more persons for the transaction of some lawful business of common concern.

Essentials of a valid meeting

1 It must be property convened as per the provisions or Companies Act and the Articles of the company concerned.

2 It should be convened by proper authority in the person authorized by the Act or the Articles, to convene the meeting.

3 Notice regarding the holding of the meeting should be sent to all the parsons entitled to receive the notice and according to the Companies Act or rules and regulation of the Articles.

4 If is property constituted i e. (a) Quorum of members as required by the Act or Articles, (b) Proper person, that is the person duly elected as chairman, is in the Chair

Proper authority to convene a Meeting

A Meeting must be convened or called by a proper authority. Otherwise it will not be a valid meeting. The proper authority to convene general meetings of a company is the Board of Directors, The decision to convene a General Meeting and to issue notice for the same must be taken by a resolution passed at a validly held Board Meeting.

That means the Board Meeting at which this decision is taken must itself be property convened and constituted.

When a General Meeting has been requisitioned by the shareholders and the Board fails to convene the meeting within 21 days, the requisitionists themselves will be the proper authority for convening the same meeting provided they convene the meeting within 45 days of the requisition.

The Companies Act also empowers the Company Law Board to convene a meeting of a Company, other than the annual General Meeting, if for some reason it becomes impossible to call or conduct such meeting as per the Act and the Articles (Sec. 186).

The Central Government is also empowered to convene the annual General Meeting of a Company, if the Company fails to hold the Meeting as per the Act and any member of the Company makes an application to the Central Government (Sec. 167).

Notice of Meetings

A Meeting in order to be valid, must be convened by a proper notice issued by the proper authority. It means that the notice convening the meeting be properly drafted according to the Act and the Rules, and must be served on all members who are entitled to attend and vote at the meeting.

General Rules

The following General rules should be observed while issuing notices of meetings:

1 The notice may take any reasonable form which sufficiently conveys to the person, entitled to receive it, information enabling the person to attend the meeting and to take part in its deliberations,

2 The notice must specify the date, times and place of meeting, all of which must be reasonably convenient to the majority of members.

3 The notice must state the nature of the business to be transacted at the meeting. That is, a complete agenda should be forwarded with or as a part of the notice.

4 The length of period of notice must be according to the rules prescribed by the Companies Act and the Articles of Association or a reasonable notice.

5 The notice must be served in the manner prescribed in the rules.

6 The notice must be served to all members entitled to receive it.

Length of period of Notice

For General Meeting of any kind at least 21 days notice must be given, to members shorter notice for annual General meeting will be valid, if all member entitled to vote, given their consent or 95% of the total voting power (Sec. 171). The consent for a shorter notice may be given either at the meeting or before the meeting in Form No. 22 A of the companies General rules and. Forms 1956.

Where special notice is required for any resolution notice of the intention to move such a resolution must be given to the company at least 14 days before the meeting at which it is to be moved. On receipt of the notice the company shall give notice of the same to its members at least 7 days before the meeting in the same manner as it is provided notice of the meeting (Sec. 190).

The number of days in each case shall be clear days ie, the days must be calculated excluding the day on which the notice is issued, a day or so for postal transit, and the day on which the meeting is to be held.

Every annual general meeting of a Company must be held either at the registered office of the Company or at some other place within the same city, Town or Village in which the registered office of the Company is situated.

Secretarial duties regarding notice of company meeting

(1). Draft notice of general meeting as per direction of Board meeting.

(2). Specify in notice of all general meetings, date, time, place and agenda. In notice of statutory meeting - mention about the appointment of proxy. In notice of Annual General Meeting - mention regarding closure of members' register and transfer books and appointment of proxy. In notice of Extra ordinary general meeting - mention about special business, explanatory statement and appointment of proxy.

(3). Print and issue notice with proper length of period : For General meetings clear 21 days, for Board meetings as per the Articles and the Company's standing order.

(4). Attach required documents with the notice,

(a) For Annual General Meeting, audited accounts balance sheet, directors and auditors' report, proxy form etc.

(b) For statutory meeting - statutory report, proxy form etc.

(c) For Extra ordinary General meeting-Explanatory statement, proxy form etc,

(5). Serve notice of general meeting to registered addresses of alt members, legal representatives of deceased or insolvent members and auditors.

(6). Read notice of general meeting in the meeting if required.

QUORUM

The word 'Quorum' is derived from latin and may be defined as the minimum number of members who must be present at a meeting as required by the rules. Any business transacted at a meeting without a quorum is invalid.

Rules regarding quorum in general meeting

As regards quorum at general meetings of a Company, the following rules must be followed :

[i] For the purposes of ascertaining quorum only members present in person, and not by proxies, are to be counted. A Company also cannot provide by its Articles for counting of proxies for the purpose of quorum.

[ii] If a Company, which is a member of another Company authorizes a person by a resolution to act as its representative at a meeting of the latter company, then such person shall be deemed to be a member present in person and counted for the purposes of quorum Sec. 187.

[iii] Where the President of India, or the Governor of a state holds shares in a company and appoints a person to act as his representative at a meeting of that company then such person shall be deemed to be a member present in person and counted for the purposes of quorum Sec. 187-A.

[iv] A member present in two capacities, as an individual member and as a trustee, may be counted as two members personally present for the purposes of quorum,

[v] Joint holders of shares are treated as single member for the purposes of counting of quorum.

[vi] Where the total number of members of a Company becomes reduced below the quorum fixed by the Articles, the rule as to quorum will be deemed to be satisfied if all members of the Company attend the meeting in person.

One Member Quorum

Ordinarily one member, even though he holds proxies of other members, cannot constitute a quorum since the word meeting prima facie a quorum means

an assembly or coming together of more than one member in person. One member may form a quorum in the following circumstances:

(a) Where one member holds all the shares of particular class, that member alone can constitute a quorum in a meeting of that class.

(b) Where the Central Government calls or directs the calling of an Annual General Meeting u/s167 of the Company Act, and directs that one member present in person or by proxy shall be deemed to constitute a meeting.

(c) Where the Company Law Board directs a meeting of the company to be called held and conducted under Sec. 186, and directs that one member present in person or by proxy shall be deemed to constitute a meeting.

(d) Where a general meeting is adjourned for of quorum and at the adjourned meeting only one member is present in person or by proxy Sec. 174 [5].

Time of Presence of Quorums

Regarding the effect of absence of quorum in a general meeting, the following provisions of Sec. 174 of the companies Act will apply unless the Articles provide otherwise.

1. If there is no quorum within half an hour of the time appointed for holding the meeting, the meeting will stand adjourned to the same day in the next week, and at the same time, unless the Board decides otherwise. If no quorum is present in the adjourned meeting within half an hour the members present shall constitute a quorum.

2. In case of a meeting requisitioned by member the meeting shall stand dissolved if there is no quorum within half an hour of the appointed time Sec. 174 [5].

Sec. 174 [5] member present shall constitute a quorum in an adjourned meeting therefore in adjourned meeting one member present in person would constitute a quorum.

Secretarial duties regarding quorum in Company Meeting

1. Company Secretary should have basic knowledge as to nature be purpose and type of meeting which transaction going to take place.

2. Find out the article of the quorum fixed for the meeting. If no provision in Articles, as per Act minimum quorum for general meeting - 5 for public companies and 2 for private companies.

3. Ascertain quorum at the meeting and advise the Chairman. For general meetings only member present in person (and not by proxy) to be counted in quorum.

4. If quorum is not present within half-an hour of appointed time, advise Chairman to dissolve or adjourn meeting. For Requisitioned general, meeting. It shall be adjourned to the same day in the next week or such other day as Board decides.

5. Draw attention of Chairman if number fails below quorum during the meeting.

Agenda

The word "Agenda" literally means 'things to be done', it refer to the programme of business to be transacted at a meeting. Agenda is essential for the systematic transaction of the business of a meeting in the proper order of importance.

Preparation of Agenda

The Agenda is usually prepared by Secretary in consultation with Director or Chairman.

The agenda may be prepared in two ways :

(a) by briefly enumerating the headings of the items, merely indicating the nature of the business to be transacted.

(b) by giving details of the business to be transacted including the wordings of the resolution to be adopted.

Loophole Agendum

While preparing the Agenda, some such items as "any other business" or any other business with the permission of the chair", is usually included as the last item of the agenda. This is done in order to enable any of the member to purpose discussion on some matter which has not been specifically included in the agenda.

While preparing the Agenda, the following points are to be kept in mind:

1. The agenda is usually prepared by the Secretary in consultation with the Chairman and Managing Director if any.
2. See that the business required to be transacted at Statutory, Annual and extra-ordinary general meeting as per Act are included in the Agenda.
3. See that Special resolution to be moved or Special business to be transacted at the meeting are included in the agenda.
4. See that systematic transaction of the business of a meeting in the proper order of importance.
5. See that items included in the agenda are within the scope of the meeting and arranged in proper order.

Secretarial duties regarding Agenda of Company Meeting

1. Draft or prepare agenda in consultation with the Chairman and the Managing Director if any.
2. Check that the business required to be transacted at statutory. Annual or extraordinary General Meeting as per Act are included in the agenda.
3. Ensure the Special resolutions to be moved or Special business to be transacted at the meeting are included in the agenda.
4. See the item included in the agenda are within the scope of the meeting and arranged in proper order based on their importance.
5. Arrange printing and issue of agenda sufficiently in advance to all members and all directors. It is Customary to send the agenda with the notice, as a part of it or as a separate sheet.
6. Prepare detailed agenda in consultation with Chairman, for own and Chairman use Get several copies of detailed agenda (known as Agenda Paper) Printed or writes the agenda in the Agenda Book, as required.
7. See the business is transacted at the meeting in the order set out in the agenda and consent of the meeting is taken if there is any variation in order.
8. Take notes of the proceeding on the agenda caper during the meeting.

Chairman of a Meeting

Chairman is the person who has been designated or elected to preside over and conduct the proceedings of a meeting. He is the Chief authority in the conduct and control of the meeting. He is "Umpire of debate" the judge of admissibility and the upholder of "order and decorum" in a meeting. Although he presides over and controls the meeting, he desire this power and authority from the meeting itself.

In addition to the Chairman, a Deputy Chairman or Vice Chairman is also elected to preside over the meetings of directors and Shareholders in the absence of the regular Chairman. In case both the permanent, chairman and Deputy chairman are absent at a meeting, the members present may elect from amongst themselves a person to preside over that particular meeting.

According to Regulation 51 and 52 of Table 'A', if the regular chairman or Deputy Chairman are not present at a meeting for 15 minutes or they refuse to preside over the meeting, the members present may elect from amongst themselves a person to preside over the meeting.

Powers and Duties of Chairman

The chairman of a meeting derives his authority and power from the meeting itself. The power and duties of the chairman of a meeting may be summarized as follows :

Powers

1. To maintain order and decorum.

He has the power to maintain order and decorum at a meeting ie, to prevent the use of improper language and disorderly behaviour of members. If his directions are not obeyed, he may adjourn the meeting or have the offending member expelled.

2. To decide points of order:

A point of order is a question regarding the procedure of a meeting. When debate on a particular motion is in progress, any member can raise a "point of order" to draw the attention of the chairman to some irregularity in the procedure of the meeting. For instance, a member may draw attention to the fact that there is no quorum. He must do it immediately he notices the irregularity as soon as a

point of order is raised, debate on the main motion will stop. The chairman will then settle the matter at once by giving his ruling which will be final. If he rules out the point of order, debate on the motion will be resumed.

3. To decide priority of speakers; When more than one member express their desire to speak on the motion, the chairman has the power to decide the priority in which the members will be allowed to speak.

4. To maintain relevancy and order in debate : The Chairman has the power to stop discussion on a motion when it has continues for a sufficiently long time and discussion seems to be endless or when the discussion becomes Irrelevant, that is when it is not within the scope of the meeting or the motion under discussion.

5. To adjourn a meeting : The chairman can adjourn a meeting under certain circumstances for instance, he can declare a meeting adjourned if the meeting becomes disorderly or when the attendance falls belong quorum or when the meeting adopts a motion of adjournment.

6. To exercise a Casting Vote : The chairman has only a deliberative vote ie. the right to cast a vote as a member. But if the rules expressly allow it, the chairman can cast a second vote known as "casting vote" to breaks a tie ie, an equality of affirmative and negative votes. The Articles of a company usually confer this right on the chairman of a company meeting.

7. To ascertain the sense of a meeting and declare the result of voting; The chairman has the right to reject a demand for "poll" if it is not properly made as per the provisions of the Act. A declaration by the chairman of the results of voting on a show of hands shall be conclusive evidence of the fail.

Duties

(1). The first duty of a chairman is to see that the meeting over which he is to preside, is properly convened and duly constituted ie, he must sea that the meeting is convened by a proper notice, that his own appointment is in order, that only those who are entitled to attend the meeting are present and that a quorum of member is present.

(2). It is the duty of the chairman to see that the proceedings of the meeting are conducted according to rules and that .he business of the

meeting is discussed in the order set down in the agenda, and that the business is within the scope of meeting.

(3). The chairman must see that no discussion is allowed unless there is a specific motion before the meeting, properly moved and seconded and that the motion itself is within the scope of the meeting.

(4). An important duty of the chairman is to maintain order and decorum in the meeting.

(5). The chairman should see that all members, including the minority, get equal opportunity to express their views. If necessary he would restrict the length of speeches and fix a time-limit for speakers.

(6). He should see that the sense of the meeting is properly ascertained on each and every motion.

(7). If poll is demanded properly, he should see that the poll is taken properly according to the provision of the Act.

(8). He must exercise this casting vote bonafide in the interest of the company.

(9). He must exercise correctly his power of adjournment.

Secretarial Duties in Connection with Meeting

Duties of the Secretary before the Meeting

(1). To draft the notice regarding the holding of the meeting in consultation with the chairman and issue it the right time according to his instructions.

(2). In order to prevent the unauthorised persons to attend the General meeting of the Shareholders some company issue, "Admit cards" which are issued to the members along with the notice of the meeting, requesting the members to sign the "admit cards" before attending the meeting. The Secretary should see that such admit cards are printed in time to enable him to send them to the members along with the notice.

(3). If it is the meeting of the Board of Directors, he should prepare the agenda under the directions of the chairman.

(4). He must see that the proceedings in respect of the previous meeting have been recorded in the minute book.

(5). He should scrutinize the proxy forms which have been received within the prescribed time and registered them because the members have a right to inspect the proxy forms.

(6). He should see the arrangement has been made for accommodating the members at the meeting.

(7). Some companies have the practice of inviting the correspondents of some leading newspaper to attend the meeting for the purpose of reporting the progress of the company with a view to have publicity. If such publicity is desired, the secretary should send the invitations to the newspaper sufficiently in advance.

Duties of the Secretary at the Meeting

1. The Secretary should see that the attendance register of the members is kept ready at the entrance of the hall, where the meeting to be held. This register has to be signed by the members before they are admitted to the meeting, after showing the Admit Card, if any and signing the register.

   For these purposes the Secretary has to assign this duty to one or two of his assistants. The admit cards should be collected by these persons after due scrutiny so that the cards may not be used again after the members has entered the hall.

   In case of proxys, the assistants should compare the signatures of the person (proxy) with that on the proxy form.

   In the case of the Board meetings, since there are a few directors and Secretary knows them personally, the attendance register of director or a paper on which the names of the directors is typed, is circulated amongst the member for their signatures before the commencement of the meeting.

2. The signatures in the attendance register of the member will enable the chairman to see whether or not the quorum is present.

3. When the Chairman is satisfied that the quorum is present, he authorises the Secretary, to read the notice issue regarding this meeting and the apologies for absence by some members at the meeting.

4. After having read the notice calling the meeting, the Secretary is authorised to read the minutes of the previous meeting and the Chairman asks the members whether the minutes should be adopted. After the minutes of the

previous meeting have been approved, the Secretary should get the minutes signed by the Chairman.

5. The Secretary should supply the necessary information, reports, documents, letters etc. to the Chairman according to the items on the agenda.
6. If any point on company law is raised, the Secretary should assist the Chairman and for that purpose he should keep the companies Act ready at hand for reference purposes.
7. He has to help the Chairman in counting the votes, conduct of poll. if demanded by the members present etc. For this purposes he asks his assistants to be available so that they may assist him in case of need.
8. He has also to take notes to the proceeding of the meeting any resolution passed, who proposed and seconded the motion, how many votes were cast in favour and against the motion and so on.

Duties of the Secretary after the Meeting

1. The Secretary should prepare the draft of the proceedings on the basis of his notes from the agenda paper or agenda books. In case of the general meetings of the Shareholders, the minutes must be written within 30 days of the conclusion of the meeting.
2. He should take necessary action on the decisions taken at the Meeting (eg) registering the resolution and transfer of shares etc.
3. He should file three copies of the balance sheet and the Profit and Loss Account after annual general meeting with the Registrar within 30 days of the meeting.

Review questions

1. What are the requisites of a valid meeting? What rules and regulations govern the convening and conduct of Company Meetings?
2. What is a notice? What are the requisites of a valid notice ?
3. How is the Chairman in a meeting appointed? Explain the powers and duties of a Chairman.
4. What is a Loophole Agendum?
5. What is meant by Agenda? What is the object of preparing an. agenda?

LESSON – 2

COMPANY MEETINGS - II

Lesson Outline

- Statutory Meeting
- Procedure for Holding the Meeting
- Secretarial Duties Relating to the Holding of the Statutory Meeting
- Annual General Meeting
- Secretarial Duties Regarding the Conduct of the Annual General Meeting
- Extra Ordinary General Meeting
- Proper Authority for convening an EGM
- Procedure for Holding an EGM
- Secretarial duties relating to the convening of an Extra-Ordinary General Meeting

STATUTORY MEETING

The Statutory meeting is the first official general meeting of the share holders. Every public limited company limited by shares or by guarantee and having a share capital must compulsorily hold this meeting within a period of cot less than one month and not more than six months of obtaining the "Certificate to commence business".

The Statutory meetings enjoys a unique feature of being held only once in the life time of a company.

Private Limited companies are not required to hold the statutory meeting. But if it becomes a Public limited company by process of law, u/s. 43-A of the companies act, within six months of its being entitled to commence business, then it must bold a statutory meeting as prescribed. But if it becomes a deemed public company after six months of its incorporation as private company, it is not obligated in holding this meeting.

The main purpose of this meeting is to enable the members to acquainting themselves as early as possibly with the financial position of the company, the assets and properties acquired so far, the future prospectus of the company,

matters relating to the formation of the company, discuss the success of the flotation.

Procedure for Holding the Meeting

After the receipt of the "Certificate of commencement of business" the Board of Directors should decide on holding the Statutory meeting within a period of not less than one month and cot more than six months from the date of certificate of commencement of business. The Secretary should prepare a draft of the statutory report and in the notice of convening the meeting. A Board meeting should then be convened to approve the report and the notice, along with any resolution proposed to be moved at the meeting. Arrangements should then be made to get the report certified as correct by two directors, including the Managing Director if there is one, and to obtain the auditor's certificate as to the correctness of the shares allotted and receipts and payments of cash. The notice of the meeting should then be sent to all members along with the statutory report at least 21 days before the date of the meeting. Immediately thereafter, a certified copy of the report should be bled with the Registrar. The secretary should also prepare a list showing names, addresses, occupations and share holdings of members.

At the start of the meeting, the Chairman will ask the Secretary to read the notice of the meeting. The secretary should then place the list of members before the meeting. This list will remain open for inspection by the members during the continuance of the meeting. After the notice has been read, the Chairman will announce that the list of members will remain open for inspection and request the members to take it that the statutory report, already circulated, as read. The Chairman will then explain the purpose of the meeting and the present position of the company and invite discussions and questions on the statutory, report and other matters relating to the formation of the company. He will also propose that the modifications of contacts proposed in the report be approved. Resolutions for which notice has been given, if any, maybe moved and discussed. After the members have discussed the statutory report, the same will be approved and adopted. The meeting will end with a vote of thanks.

After the meeting, the Secretary will drafts the minutes of the meeting and get it approved and signed by the Chairman at the next Board meeting.

Secretarial Duties Relating to the Holding of the Statutory Meeting

The secretarial duties to be followed in this regard can be divided into (a) Before the meeting, (b) During the meeting and (c) After the meeting.

They are;

(a) Before the meeting:

(b) Basic Procedure:

1. The Secretary, has to keep in mind the time limit as prescribed by the Act for holding the meeting (ie) not before one month but within six months from the date of the certificate of commencement of business and tee to it that the statutory meeting is held within that time.

Specific Procedures

1. The Secretary has to draft the statutory report in Form 22. The contents of this report are as follows:
   - (a) the total number of shares allotted, distinguishing those allotted as fully or partly paid up otherwise than in cash, the extent to which they are partly paid up, the consideration for which they have been allotted and total amount received in cash;
   - (b) an abstract of the receipts and payments under distinctive heads upto a date within seven days of the date of report;
   - (c) an account or estimate of the preliminary expenses of the company showing separately any commission or discount paid or to be paid on the issue or sale of shares or debentures ;
   - (d) the names, addresses and occupations of the directors and auditors of the company, and also of its managing director or manager and secretary, if any, and the changes, if any, that have occurred in such names, addresses, and occupations since the date of incorporation;
   - (e) the particulars of any contact which, and the modification or proposed modification of which, are to be submitted to the meeting for approval;
   - (f) the extent to which underwriting contacts, if any, have not been carried out and the reasons there of;

(g) the arrears, if any, due on calls from directors, managing director or manager; and

(h) the particulars of any commission or brokerage paid, or to be paid, in connection with the issue or sale of shares to any director, managing director or manager.

2. The Secretary has to prepare a proper draft of the notice of the meeting.
3. Then take necessary steps to hold a Board Meeting to get the draft report and notice approved.
4. Once the drafts have been approved to get the same certified as correct by two directors, including the Managing Director, and also by the auditor of the company.
5. To get the Statutory report and notice printed and send them to the members atleast 21 days before the date of the meeting.
6. To file a certified copy of the report with the Registrar as soon as possible.
7. To prepare a detailed agenda of the meeting in consultation with the Chairman.
8. To prepare the list of members from the Register of Members (This is the first time the list of members is prepared by the company)
9. To make other arrangements to actually hold the meeting.
10. In case members can appoint proxies to attend the meeting on their behalf, then to check that proxy forms properly filled are sent by the members and have reached the company before 48 hours of the time of the meeting.

During the Meeting

1. The secretary has to help the Chairman in ascertaining the quorum of the meeting.
2. If so directed by the chairman, he has to read the notice of the meeting.
3. To produce the list of members at the commencement of the meeting and keep it accessible to members for their inspection during the continuance of he meeting.

4. To read the whole or part of the statutory report as requested by the Chairman.
5. To give relevant facts, information and explanations wherever required and us directed by the Chairman.
6. To take notes of the proceedings of the meeting.

After the Meeting

1. To prepare the minutes of the meeting from the notes taken by him curing the meeting and also get it approved and signed by she Chairman within 30 days of the meeting.
2. To carry out the decisions arrived at, at the meeting.

These are the secretarial duties to be adhered to by a company Secretary in relation to the holding of a Statutory Meeting.

Consequences of Default

If a company makes default in holding the Statutory meeting within the prescribed period or in issuing and filing the Statutory report according to the provisions of the companies act, every director or other officer of the company in default will be liable to pay fine which may extend to Rs, 500/- Moreover, a company may be wound up by the court, if default, is made in delivering the statutory report to the Registrar or in holding the meeting.

The Registrar or any contributory of the company may file a petition in the court for the compulsory winding up of the company, after the expiry of 14 days from the date on which the meeting was to be held. After giving the company reasonable opportunity to make representation for the default, the court may direct the company to hold the statutory meeting and issue and file the statutory report on or before a prescribe date or the court may decide to pass order for the compulsory winding up of the company.

The court ordinarily does not take a serious view of the default. Where a petition has been made for the compulsory winding up of a company for the reasons either not holding the meeting or for non-submission of report, the court usually orders the company to hold the meeting or deliver the report- within a specified time, only in extreme cases does it order for compulsory winding.

Therefore, the first and foremost important duty of a company secretary is to see that the Statutory Meeting of the company is held in the prescribed manner within the prescribed time limit.

ANNUAL GENERAL MEETING

Every company, public or private must hold an Annual General Meeting of share holders once every calendar year. Such a meeting is to be held in addition to any other general meeting of share holders that may become necessary during the same year.

Hence we can see that the Annual General Meeting is a yearly and recurrent affair.

The first AGM must be held within 18 months of the incorporation of the company and thereafter it must be held within six months of the expiry of the financial year of the company.

The proper authority for convening the AGM is the Board of Directors. The resolution for convening the AGM must be passed in a properly convened and duly constituted meeting of the Board, otherwise it will become invalid. And in case the company fails to hold the AGM within the prescribed time then the Company Law Board has the power to convene the AGM of the company.

The AGM is held each year with a view to enable the share holders review and evaluate the overall progress of the company during the past year.

Business Transacted at AGM

Sec. 173 of the Companies Act specifies business which will be considered as ordinary business, which is the main purpose of holding the AGM (i.e.) to transact these specified ordinary business. They are

1. Consideration and approval of the annual accounts and balance sheet and the Auditors Report thereon.
2. Consideration and approval of the Annual Report of Directors.
3. Declaration of dividends, if any
4. Appointment of directors in place of those retiring by rotation.
5. Appointment of the auditors and fixing their remuneration.

These ordinary business transacted at the AGM requires an ordinary resolution which can be passed by simple majority.

If a company in its AGM want to transact any other business other than those stated above, it is treated as special business. Special business can be transacted at an AGM provided the articles do not prohibit it and due notice of the special business is given to members as per the act.

Depending on the nature and type of the special business it is passed either by a special or ordinary resolution.

Notice and Annexures

Every member of the company must be sent a notice of the AGM atleast 21 days before the date of the meeting. A shorter period of notice can be given if all members entitled to vote at the AGM give their consent.

The notice of the AGM must be accompanied by all relevant documents as required by the companies act and for the proper conduct of the meeting, These documents are:

1. Audited Balance sheet and profit and loss account for the relevant financial year, along with the Auditor's report: (Sec. 211) The purpose of the AGM is to enable the members to discuss the affaires of the company and exercise their rights and privileges on the basis of the audited annual accounts and the director's report. Consideration, discussion, approval and adoption of the annual accounts and balance sheet of the company is one of the most important items of business transacted at this meeting.

Therefore, the Balance Sheet and Profit and loss account must give a true and fair view of the state of affairs and profit or loss of the company.

The Balance sheet and profit and loss account must be drawn up in the form prescribed in the companies act or in such other form approved by the Central Government.

Annual Report of Directors (Sec. 127)

The Companies act requires that the Annual Report of Director must be attached to every balance sheet laid before a company in general meeting. This Report must be dated and signed by the Chairman of the company, if be is authorised to do so, or by such number of directors as are required to sign the

balance sheet and profit and loss account of the company (ie., by not less than two directors, one of whom shall be the managing director, if there is one) The Report must contain the following information.

(a) the state of the Company's affairs.

(b) the amounts, if any, which it proposes to carry to any reserve in such balance sheet;

(c) the amount, if any, which it recommends should be paid by way of dividend ;

(d) material changes and commitments, if any, affecting the financial position of the company which have occurred between the end of the financial year of the company to which the balance sheet relates and the date of the report.

(e) the conservation of energy, technology absorption, foreign exchange earnings and outgo in such manner as may be prescribed by the act.

The Board's report shall deal with any changes that have occurred during the financial year in the nature of the company's business, in the company's subsidiaries and changes in their nature of business, and generally in the classes of business in which the company has an interest, so far as is material for the appreciation by members of the state of affairs of the company and will not, in the Boards opinion, be harmful to the business of the company or any of its subsidiaries.

Explanatory Statements, if any special business is to be transacted at the meeting: Sec. 173 (2)

Proxy Form : Sec. 176 (5)

The members of a company enjoy the privilege of appointing a proxy to attend a general meeting on his behalf. This is subject of course to the provisions in Ibis regard in the Articles of the Company.

But, for the proxy to be valid, the members mint duly send the completed proxy forms to the company before 48 hours of the time of the meeting.

Penalty for Default

If the company fails to hold the AGM within the prescribed time limits then the company and every officer of the company in default will be penalized

with a fine which may extend to Rs. 5,000/- and Rs. 50 per day for continuing default.

Secretarial Duties regarding the conduct of Annual General Meeting

The Secretary's duty with regard to the conduct of an AGM can be classified into :

(a) Before the meeting

(b) During the meeting and

(c) After the Meeting.

Before the Meeting

1. The Secretary must arrange for the preparation of the annual accounts as per the provisions of the act and get it duly audited and certified by the auditors.
2. He has to prepare a draft of the annual report of the Directors in consultation of the Chairman.
3. Prepare a draft of the notice, agenda of the Board meeting, required for approving the accounts and report, ia consultation with the Chairman and issue the notice.
4. Convene the Board Meeting, submit the annual accounts and report for approval and authentication and get the date and time of the meeting fixed (AGM). Also get the approval of the notice calling the AGM.
5. Get the notice, agenda, annual accounts, annual reports, auditors report, proxy form, admission cards etc, printed.
6. Despatch the notice along with the required annexures to every member of the company atleast 21 days before the meeting.
7. Prepare a detailed Agenda the Chairman's speech and the annual return in consultation with the chairman.
8. On being authorised by the Board, Close the Transfer register balance the share register and prepare the Dividend Lists and warrants.
9. Securities the proxies received before 48 hours of the meeting, counter sign them and enter them in the list of proxies.
10. Keep all important registers, documents, papers which may be consulted by the directors at the time of the meeting.

11. Prepare himself with relevant facts and information and explanations in case the need arises on he is asked to produce them.

12. Make other necessary arrangements-like seating, refreshments etc., for the actual conduct of the meeting,

At the Meeting

1. See that the admission cards are collected at the entrance to prevent unauthorised persons gaining entry.
2. Help in ascertaining the quorum of the meeting at the beginning of the meeting and also constantly keep an eye to see that the quorum does not fall and if it does inform the chairman at once.
3. If directed by the chairman, read the notice of the meeting, the letters of apologies for absence.
4. To also read either full or part of the director's and the auditors reports if necessary.
5. Produce the Memorandum and Articles for reference.
6. Supply necessary facts, information and explanations when the need arises.
7. Assist the chairman in the proper conduct of the meeting.
8. Supervise and conduct the poll when required.
9. Take notes of the proceedings of the meetings and record verbation the terms of all resolutions passed.

After the Meeting

1. Prepare the minutes of the meeting from the notes taken, record the same in the minutes book, get the same approved and signed by the chairman within 30 days of the meeting.
2. Send the appointment letters to the directors and auditors who have been appointed or reappointed and remind them to file their consent with the Registrar of companies within the prescribed time.
3. Make arrangements for the issue of dividend warrants and payment of dividends as per the decisions of the meeting.
4. Make arrangements with the company Bankers for opening a new account called the Dividend Account and check that the amount required for payment as dividend is deposited in this account and give suitable

instructions to the bankers on what basis to make payment from this account.

5. He has to get ready the Dividend Notices and warrants and Tax Deduction Certificates signed by the authorised person(s) and arrange for the same to be despatched to the share holders within 42 days of the declaration of dividend.
6. Make arrangement to see that the tax deducted from the dividends is paid to the Income-tax Authorities or the Government Treasury along with the prescribed Tax Return.
7. Execute or take steps to execute all other instructions and resolutions passed at the meeting.
8. Arrange for filing the annual report, annual accounts, annual return (in sets of three) special resolutions and resolutions adopted unanimously with the Registrar of companies within 30 days from the date of the meeting.

The Secretary is obligated in carrying out these duties diligently and earnestly while convening the Annual General Meeting.

EXTRA ORDINARY GENERAL MEETING (EGM)

All general meetings of a company other than the statutory meeting and the Annual General Meeting arc called the "Extraordinary General Meeting (EGM)"

These meetings may be convened by the company an any time. And the business transacted at an EGM are urgent, ones which cannot be postponed till the next annual General Meeting. All these urgent business are called Special Business, the convening and conducting of this meeting just as for an AGM.

Some examples of special business for which an EGM is convened are — alteration of the Memorandum and articles of Association; alteration of the share capital; removal of a director from office before the expiry of his term; etc.,

Proper Authority for convening an EGM

The EGM may be convened by.

The Directors Themselves

The Directors, may, whenever they think fit, convene an EGM by passing, a resolution to that effect in a properly convened Board Meeting.

The Directors on Requisition (Sec. 169)

The Directors must convene an EGM on the requisition (written demand) of members holding not less than one tenth of the total voting rights on the matter of requisition. The requisition must state the objects of the meeting. It must be signed by the requisitionists and deposited at the registered office of the company. The directors should within 21 days from the date of the deposit of a valid requisition, move to call a meeting and should give 21 days notice to all members for calling such a meeting and the meeting should actually be held within 45 days from the date of the requisition.

The Requisitionists themselves (Sec. 169)

If the directors fail to call the meeting within 45 days from the date of the requisition, the requisitionists or such of them as represent not less than one tenth of the total voting rights of all the members, may themselves convene a meeting within three months of depositing the requisition. Such a meeting should be called in the same manner, as nearly as possible, as that in which meetings arc called by the Board. Any reasonable expenses incurred by the requisitionists must be repaid to them by the company, and any sum so paid shall be retained by the company out of any sums due or likely to become due to the directors in default.

The Company Law Board (Sec. 186)

If for any reason it is impracticable to call or conduct an EGM by the Board or the requisitionists, the company Law Board may, either of its own motion or on the application of any director or any member who would be entitled to vote, order a meeting to be called, held and conducted in such manner as it thinks fit and may give such directions as it thinks expedient including a direction that one member present in person or by proxy shall be deemed to constitute a meeting.

An EGM can be convened on a public holiday and can be held at a place other than the Registered Office of the Company or the city in which such office is situated.

Explanatory Statement

The notice convening an EGM must be accompanied by an "Explanatory statement". The object of such a statement is to explain to the members the reasons of passing a resolution so as to ensure its smooth adoption Explanatory statement is necessary for each item of "Special Business". And in the case of EGM all business being considered "Special" the notice of such a meeting must be annexed with an explanatory statement.

This explanatory statement should mention all material facts concerning the Stems of business, including in particular, the nature and extent of the interest of every director, and the manager, if any. If any such special business consists of according approval to any document by the meeting, the statement must specify the time and place where the document can be inspected by the members. This statement is to be approved by the chairman before it is actually issued.

Procedure for Holding an EGM

When the directors decide to hold the EGM on their own initiative, a Board meeting has to be convened to decide the date, time and place of the meeting, as well as the resolution to be passed at the meeting. The notice and explanatory statement to be sent to shareholders are then drafted. The notice must contain the text of the resolution to be proposed at the meeting and must state that the resolution to be passed as on ordinary or a special resolution. The notice is then sent to the share holders along with the explanatory statement atleast 21 days before the meeting. At the same time the notice is also published in the newspaper giving the date, time and place of the meeting as well as the nature of the resolution to be passed. The secretary then prepares a detailed agenda in consultation with the directors.

If the directors decide to convene the EGM on the requisition of members, they must first ascertain that the requisition letter is in order, is signed by share holders holding in the aggregate not less than one tenth of the paid-up capital carrying voting power if the company has share capital or by members enjoying at least 1/l0th of the voting power in case the company has no share capital, and the letter is deposited at the registered office of the company. The directors must then issue the notice of the meeting within a reasonable time of

the deposit of the requisition and the meeting to be held within 45 days of the same date.

At the meeting, the chairman of the Board will act as the Chairman. The Chairman must first ascertain that the meeting is duly convened and constituted, is attended by members who are entitled to attend and that quorum ii present. After the notice has been read by the secretary, the chairman will proceed with the business as per agenda. Before moving the resolution, the chairman usually addresses the meeting and explains the need and importance of passing the resolution. After that he moves the resolution and invites the members to take part in the discussion. After thorough discussion it is put to vote and adopted. If the members demand a poll, he must arrange to take it with the help of the secretary. If the resolution is a special resolution, it must be passed by a 3/4[th] majority. The meeting terminates with a vote of thanks.

After the meeting, a duly certified copy of the special resolution must be filed with the Registrar within 30 days of the meeting. Also a printed copy of the special resolution must be embodied or annexed to every copy of the Articles issued by the company after the passing of the resolution. The secretary must also prepare the minutes of the meeting and get the same signed by the chairman within 30 days of the meeting.

Secretarial duties relating to the convening of an Extra-Ordinary General Meeting

The duties of the Secretary before, at and after an EGM can be enumerated as:

(A) Before the Meeting

1. To convene a Board Meeting to transact the following business :
   (a) If a requisition is received from members, to ascertain whether it is in order as per the requirements of Sec. 169 and to decide on .holding the meeting.
   (b) Whether the meeting is to be called on requisition or on the initiative of the Board to fix the date, time and place of the meeting and to approve the agenda of the proposed meeting as a special business.

(c) To approve the draft notice, resolution and explanatory statement as required U/s. 173 of the Act.

(d) To authorize the secretary to issue the same.

2. To get the notice, explanatory statements, proxy forms, admission cards and other documents which are required to be sent with the notice, printed.
3. To issue the notice to all members entitled to attend the meeting, at least 21 clear days before the date of the proposed meeting.
4. To arrange for the publication of the notice of the meeting in newspapers.
5. If the shares of the company are listed, to send an intimation of the meeting to the concerned stock exchange.
6. To get ready documents, facts and explanations which may be required at the meeting.
7. To get things ready to bold a poll in case the need arises.
8. To scrutinize the proxy forms received upto 48 hours before the meeting and enter them in the list of proxies.
9. To make all arrangements for the conduct of the meeting.

At the Meeting

1. To see to it that arrangements are made for the proper checking of the admission cards at the entrance and the attendance of members is recorded in the attendance register.
2. To help the Chairman ascertain the quorum of the meeting (5 in case of Public company and 2 in a Private Company).
3. To read the notice of the meeting if requested to by the Chairman.
4. To assist the Chairman in the successful conduct of the meeting and to supply all relevant information, facts, clarifications, documents and registers etc, that may be required for proper conduct and transaction of the meeting and business respectively
5. To assist the Chairman in ascertaining the sense of the meeting, including conducting the poll, in a proper manner and appointing suitable person to count the votes and supervising the counting.

6. To keep a constant eye on the member to check that the quorum does not, fall, and if it does to inform the chairman at once.
7. To take notes of the proceedings of the meetings and to take down the words of the resolutions verbation for the records.

After the Meeting

1. To carry out the intentions of the meeting and to take steps foe executing the terms of the resolutions adopted at the meeting
2. To file with the Registrar of companies the Form No. 23 along with certified copies of the resolutions adopted at the meeting, within 30 days of the meeting.
3. If the Share Capital of the number of directors has been increased or the shares have been consolidated or converted into stock, then to file Form No.5 with the Registrar of Companies along with prescribed filing fees within 30 days of the meeting.
4. If at the meeting, resolutions had been passed for the alteration of the clauses of Memorandum or Articles of Association, to see that the alterations are incorporated in the same and new Memorandum or article is printed with the newly incorporated changes and the same are filed with the Registrar within 3 months of the meeting.
5. To prepare the minutes of the proceedings of the meeting from the notes taken during the meeting, record them in the Minutes Book and get the same approved and signed by the Chairman within 30 days of the meeting.
6. To send copies of the minutes to the concerned stock exchanges, if the shares of the company are listed.

These are duties that a Secretary is expected to do sincerely and carefully while convening an EGM.

Review Questions

1. What is a statutory meeting? When and how is it held?
2. Enumerate the duties a company secretary regarding the statutory meeting?
3. What is an EGM? When and by whom it will be called and convened?
4. Describe the duties of a company secretary regarding convening AGM.

LESSON – 3

COMPANY MEETINGS - III

Lesson Outline

- Meetings of Directors
- Requisites of Board Meetings
- Procedure where Board Meeting is Adjourned: Sec. 288
- Authority for convening Board meeting
- Chairman of Board meetings
- Agenda of Board Meetings
- First Board Meeting
- Preparations for Board Meetings
- Validity of acts of Directors or the Board
- Procedure for passing Resolution by Circulation: Sec. 289
- Minutes of Board Meetings
- Procedure for Keeping Minutes of Board Meetings
- Secretarial Duties relating to convening of Board Meetings.

MEETINGS OF DIRECTORS

A Company being an artificial person having more number of shareholders as its owner, is managed by the elected representatives of them (i.e. the shareholders). These representatives are called the Directors or they are collectively known as the Board of Directors or simply the Board.

These directors are required to meet frequently to discuss and decide upon policy matters, relating to the management of the company and to review its progress.

All powers of management assigned to the directors by the Act and the Articles of a company can be exercised only by passing resolutions at duly constituted meetings of directors. This meeting is called the Board Meeting.

A committee can also be appointed by the Board to help and assist them in taking decision in specific proposals. Generally the directors are the members

of the committee. It is set up to investigate certain matters and to report their findings to the Board.

Requisites of Board Meetings

The decision of a Board Meeting will not be considered valid unless it is properly convened and duly constituted. That means it must be convened by, the proper authority by a proper notice, the proper person must be in Chair, and the requisite quorum must be present The rules regarding the holding and conduct; of Board Meetings are laid down by the Act and the Articles. The companies Act also allows the Board to frame its own rules and regulations known as Standing Orders, for the conduct of Board Meetings where the Act and the Articles are silent.

According to the provisions of the companies Act, a Board meeting must be held atleast once in every three calendar months, and atleast four such meetings must be held in every year. Sec. 285. It has been clarified by the Department of Company affairs that, so long as four Board meetings are held in a calendar year, one in each Quarter, the interval between two meetings of the Board may be more than three months.

However, Board Meetings may be held more frequently if the circumstances so demand. The requirements of the Act in this respect may be waived or Modified by the Central Government in the case of any class of companies. (Provision to Sec. 285).

Notice of Board Meetings

Sec. 286 of the Act docs not prescribe any form of notice or the mode of service of notice of Board Meetings. It provides that notice of every meeting of Board of directors of a company must be given in writing to every director for the time being in India, and at the usual address in India of every other director. Usually a week's notice is considered sufficient. However, if the Articles provides that Board Meetings will be held on fixed days of every month or where the directors are duly informed that in future all meetings of the Board will bi held on a fixed day of everyday of every month, it will be sufficient compliance with the statute. Even in this case a notice as a reminder is sent to them.

The notice of Board Meetings must state the date, time and place of the meeting. Unless the articles otherwise provide, the nature of the business to be

transacted at the Board meeting, i.e. the agenda, need not be specified. However a copy of the agenda of the Board meeting is usually sent along with notice.

Notice of Board meetings must be given properly to every director. If a director is improperly or accidentally excluded from a meeting of the Board, he may sue for declaration of the entire proceedings of the meetings as invalid. If a meeting is rendered irregular for accidental omission to give notice to a director, but the directors present at the meeting transact business on behalf of the company. Outsiders will be protected as against the company under the "doctrine of indoor management" or the rule in Royal British Back VS Turquand.

There is no statutory obligation that once a meeting of the Board of directors has been convened, it has to be held as scheduled. A notice convening a Board meeting may be cancelled altogether by a further notice.

Time and Place of Board Meetings

The Act doesn't specify that Board Meetings must be held at the registered office of the company, or during the business hours and on a day which is not a public holiday. Thus. Board meetings may be held at any place other than the registered office of the company and outside business hours and even on a public holiday. But however, an adjourned Board meeting cannot be held on a public holiday. Sec. 288(1)

The companies Act requires certain Registers like register of Firms, companies and contracts in which the directors are interested to be kept at the Registered Office for the inspection by the members Sec. 301 (5). But at the same time the above said Registers should be placed before the Board in the meetings for obtaining the signature of all the directors present. If the Board Meeting is held at a place other than the registered office, it will involve removal of these registers from the registered office, which will violate the provisions of Sec 301 (5). For this purpose it should be held at the Registered Office.

Quorum of Board Meeting

According to the provisions of Sec. 287 of the companies Act, the quorum for a meeting of the Board of director shall be one-third of its total strength (any fraction contained in that one-third Being rounded off as one) or two directors whichever is higher. If at anytime the no. of interested directors exceeds or is equal to two-thirds of the total strength, the remaining directors

that is to say the no, of directors who are not interested present at the meeting being not less than two, shall be the quorum of such meeting.

The minimum number of directors forming the quorum of a Board meeting can also be fixed by the Articles or the Board itself, at a higher figure or proportion than that required under the Act, must be present at the beginning of a meeting as well as throughout the meeting. The proceedings of the Board meeting will become invalid of quorum is not maintained throughout the meeting, unless the articles specifically provide for exceptions to this rule.

Adjournment for Lack of Quorum

In a meeting of the Board cannot be held for want of quorum, then unless the Articles otherwise provide the meeting shall be automatically adjourned till the same day in the next week, at the same time and place, or if that day is a public holiday, till the next succeeding day which is not a public holiday.

The provisions of Sec. 285, i.e. holding of Board meeting atleast once in every three months and atleast four such meeting in every year, shall not be deemed to have been contravened merely by reason of the tact that a Board meeting called in terms of that section could not be held for want of quorum.

Where the meeting is adjourned for lack of quorum, no fresh notice fixing the time and place of the adjourned meeting is necessary under the Act. Unless the Articles otherwise provide. Where the Articles give power to the directors to fix the date, tine and place of the adjourned meeting no fresh notice is necessary.

Procedure where Board Meeting is Adjourned: Sec. 288

Articles

The Secretary will have to first check the Articles whether such adjournment is permitted. The Articles usually provide that where a Board meeting cannot be held for want of quorum, it will be adjourned and held on such dale and time as the Chairman may decide.

Fresh Notice

On the direction of the Chairman the Secretary will issue fresh notice to the directors for the adjourned meeting, if necessary. If suppose a new business is to be discussed at the adjourned meeting, then a fresh notice along with a fresh agenda should be sent to the directors.

Conduct of adjourned meeting

The adjourned Board meeting will be conducted as same as a original meeting would be conducted. All the resolutions passed at the adjourned Board meeting will get validity as if it were passed at the original Board meeting.

Authority for convening Board meeting

The Companies Act docs cot prescribe the competent authority for convening Board meetings The Articles of a company usually provide for the procedure and competent authority for convening Board meeting. If the Articles is silent with regard to this, then Regulation 73(2) of Table 'A' of Schedule I provides for a procedure and authority competent to summon a Board meeting.

The usual procedure followed to most companies is that the directors at a meeting already convened and held decide tentatively on a date convenient for the purpose of holding the next board meeting and the Secretary is authorised to issue notice of the meeting in appropriate time.

Chairman of Board Meetings

Every Board meeting must have a Chairman to preside over the meeting. The Articles of company usually provide who shall preside over Board meetings. If the Articles do not name the Chairman, the directors themselves may elect the Chairman and fix his term of office at the first Board meeting or in any other subsequent Board meeting as necessary. Usually the Chairman named in the Articles or elected by the directors at the first Board meeting after incorporation presides over all Board meetings. He may also be empowered to preside over general meetings of members. If the Chairman named in the Articles or elected by directors is not present within five minutes of the time fixed for the meeting, the directors may elect one of their members as temporary Chairman for that meeting.

Regulation 76 of Table 'A' provides (1) The Board may elect a Chairman of its meetings and determine the period for which be is to hold office, (2) If no such Chairman is elected, or if in any meeting the Chairman is not present with in five minutes after the time appointed for holding the meeting, the directors present may choose one of their members to be Chairman of the meeting. Even a non-shareholder director can be chosen to act as a Chairman.

Agenda of Board Meetings

It is customary to send a copy of the agenda, even though it is not obligatory in Law Agenda refers to the business to be transacted at the meeting. It is usually sent along with the notice of every Board meeting. It is the duly of the Secretary to send agenda of a Board meeting in consultation with the Chairman of the Board Directors, and the Managing Director, if any. Although Board meetings are held frequently and many of the items of business transacted at these meetings are of routing nature the agenda should be prepared carefully and the relevant reports, statements, accounts, etc. should be kept ready for each item of the agenda. The agenda should be complete and sufficiently explicit to enable the directors to form opinions on them and come prepared to give their views at the meeting.

It is a good practice to circulate along with the agenda of a Board Meeting the resolutions proposed to be moved at the meeting. Copies of the agenda are also prepared on large sheets of paper known as Agenda paper on which the items of business are typed on the left hand side keeping sufficient blank space on the right to enable the Chairman and Secretary to keep agenda notes.

First Board Meeting

The first meeting of Directors or the First Board meeting is held just after incorporation of the company. This meeting has much importance and needs special attention as many matters consequent upon the incorporation and necessary for carrying on the business, have to be decided upon at this stage, for eg. the Chairman of the Board and other officers of the company have to be appointed at this meeting at this stage so that the management is not hampered.

Preparations for Board Meetings

As required by law, meetings of directors must be held at least once in every three months. But it may be held more frequently if necessary. The Secretary must make preparations fur such meetings well in advance so that important matters to be discussed may not be left out.

During the period between two Board meetings the Secretary should take notice of the matters to be discussed at the next Board meeting. Based on this he should prepare the agenda of the meeting in consultation of the Board. Any motion or resolution for which notice has been given by any director should be included in the agenda.

After the notice of the meeting has been issued, the Secretary should start making ready I he books, registers, documents etc. to be required at the meeting. He should write up the minutes of the last Board Meeting in the Minute Book of the Board Meetings and keep it ready.

Validity of acts of Directors or the Board

Section 290, of the companies Act provides that, acts dons by a person as a director shall be valid notwithstanding that it may afterwards be discovered that his appointment as director was invalid by reason of any defect or disqualification or had terminated by virtue of any provision in the Act or in the Articles. However, nothing in this Section shall be decreed to give validity to acts done by a director after his appointment has been shown to have been invalid or to have terminated.

Voting by Directors

Each director has one vote which he can exercise on any motion except where he is debarred from voting as an interested director. If the Articles so provide, the Chairman of the Board Meeting can exercise his casting vote in case of a tie, in addition to his vote as a director. Voting at Board Meetings is done by show of bands and all motions are passed by a simple majority, unless the law requires a motion to be passed unanimously. The companies Act requires that motion for approval of the prospectus, appointment of a person as Manager or Managing Director in a second company, inter-company investment etc. must be passed by the Board unanimously.

Director's Attendance Book

In order that the names of directors, attending a Board meeting may be properly recorded and to fix responsibility for acts done at a meeting, it is necessary to maintain a 'Director's Attendance Book'. The Articles of a company usually contain provision in this respect.

Procedure for passing Resolution by Circulation: Sec. 289

1. Preliminary: The Secretary will decide in consultation with the managing director or other Chief executives whether the Board's / Committee's approval need be taken under this Section. If so, the necessary draft will be prepared together with the supporting papers.

2 Circulation: The draft resolution together with Supporting papers will be circulated to all directors then in India, who Bill not be less than the quorum for a Board meeting and to others at their addresses in India. Separate circulating sheet with enclosures may be sent to each director. Alternatively, the same sheet will be circulated to the director.

3. Approval: The resolution will be treated as passed when after circulation as stated above the majority of the directors in India entitled to vote approve it. This is usually done by each director writing, 'Approval' or 'agree' against his name and signature where a director is interested he may write 'Interested and abstain' against his name and signature.

4. Follow up Action: Therefore, follow up action in relation to filing and others will be taken where applicable.

The Board / Committee can do the following matters through passing resolution by circulation Ref, ANNEXURE No. 1.

Board is prevented from doing certain activities. These activities are specified in the ANNEXURE 2.

Minutes of Board Meetings

Under Sec. 193 of Companies Act, every company is required to have the Minutes of proceedings of all Board Meetings and meetings of committees of the Board entered in a separate Minute Book kept for the purpose. This is to be done within 30 days of the conclusion of the meeting. The pages of the Minute Book must be consecutively numbered and each page of the book should be initialed or signed, and the last page of the Chairman of the next succeeding meeting. In no case the minutes of proceedings of a meeting shall be attached to any such book by pasting or otherwise. Failure to comply with these provisions will make the company and its officials to a fine extending to Rs.50/- [Sec.113(1), (1A)and(6)].

Procedure for Keeping Minutes of Board Meetings

1. Draft of Minutes

On conclusion of the Meeting the Secretary will prepare a draft minutes on the basis of the agenda and resolutions passed at the meeting.

2. Chairman's approval

The draft minutes will be approved by the Chairman of the meeting with such changes as he considers necessary so as to ensure that the minutes will contain a fair and correct summary of the proceedings.

3. Writing or otherwise Recording

After the Chairman's approval, the Secretary will cause the minutes to be written in the Minute Book or typed for Loose-Leaf Binder, within 30 days of the conclusion of the meeting.

4. Circulation of Draft Minutes

Draft minutes as finalized may be circulated to all directors for this comments, if any.

5. Confirmation / Adoption

Even though no confirmation by directors of the minutes is necessary, it is usual to place the minutes before the next Board meeting and thereafter signed and dated by the Chairman of that meeting after incorporating any change if necessary on the basis of comments received.

6. Filing with Registrar

Where any resolution of the Board requires to be filed with the Registrar, the Secretary will take action to do so within 30 days of the Board's approval at the meeting.

7. Copies to be furnished to concerned persons

Where the Board or committee has decided that any action will be taken by others, the Secretary will furnish certified copies of the decisions to the concerned persons to enable them to take action as directed.

8. Evidence

Minutes arc deemed to be evidence of proceedings recorded therein.

9. Place of keeping

The minute book should be kept at the registered office of the company.

10. Inspection

Minutes of Board Meetings are not open to inspection of members. But directors or auditors may inspect the same.

A member is entitled to be furnished with copies of minutes within 7 days of request on payment.

Secretarial Duties relating to convening of Board Meetings

The Secretary plays of important role in the holding of Board meetings. As the principal officer he should ensure that every Board meetings is properly convened and duly constituted and that the provisions of the Act Articles and standing orders are complied with in the conduct of these meetings. The principal duties of the Secretary relating to Board Meetings may be outlined as follows.

Before the Meeting

1. If the date, time and place of the Board meeting has not been fixed by the proceeding meeting, to fix the same in consultation with the Chairman of the Board.
2. To prepare the agenda in consultation with the Chairman or as directed by the person convening Board Meeting.
3. To send notice of the meeting along with the agenda to all directors in India and to the usual address in India of all directors not in India.
4. To receive resolutions from directors proposed to be discussed at the meeting and circulate them among other directors.
5. To issue invitation letters to solicitors, auditors etc. who are required to attend the meeting by special invitation.
6. To prepare and keep in readiness, statements and reports regarding the company's trading activities documents including cheques, contracts, transfers instruments etc. for sealing and signature.
7. To keep ready the Bank pass Book and certificate of cash balance, the Minute Book of Board Meeting indexed copies of memorandum and articles, the Company's seal etc.

8. To arrange for the seating arrangement, stationery and other equipment necessary for holding the meeting.

At the Meeting

1. To obtain signature of the directors present, in the Directors attendance Book.
2. To help the Chairman by ascertaining whether quorum is present or not as per Articles.
3. To read the notice of the meeting if required or if requested by the Chairman.
4. To read the Minutes of the last Board meeting if requested by the Chairman and to obtain the signature of the Chairman to the minutes when it is approved by the meeting.
5. To assist the Chairman in conducting the Meeting including taking of votes.
6. To supply necessary information and explanations to the directors when required.
7. To take notes proceeding on the agenda paper including exact terms of the resolution passed.

After the Meeting

1. To prepare the minutes from his own and Chairman's agenda notes and enter the same in the Minutes Book within 30 days of the meeting.
2. To circulate the minutes amongst the directors.
3. In case of a Board meeting held to approve the draft profit and loss account and balance sheet appropriation suggested by the Board ϵ c, to allow inspection of the draft by the auditors.
4. Where some agreement has been approved, to arrange for the sealing of the agreement with the common seal, after entering the same in the seal Book.
5. To carry out the instructions issued to him by the Board and to carry out statutory duties specifically imposed on him.
6. To start collecting and preparing materials for the next Board Meeting.

ANNEXURE – 1

Resolution of the Board/Committee by circulation, which cannot be done by.

Sec. 262: In the case of public company or its subsidiary private company, a casual vacancy among the directors cannot be filled by such a resolution.

Sec. 297: By such a resolution sanction cannot be accorded to contracts specified in Cle. (a) and (b) of Sub-Sec. (1) of Sec 297 in which contracts any director etc. are interested.

Sec. 299: By such a resolution disclosure of a director's interest in any contract or arrangement with the Company cannot be taken or accepted.

Sec. 308: By such a resolution a directors' disclosure of his shareholdings under Sec. 308 cannot be taken or accepted.

Sec. 316: By such a resolution a managing director cannot be appointed or employed in one more company as provided in sub-Sec (2) of Sec.316.

Sec. 386: In the case of Public company of its subsidiary private company by such a resolution approval cannot be accorded to the appointment or employment of a manager in one more company, as provided in Sub-Sec. (2) of Sec. 386.

ANNEXURE – 2

The Board is prevented from doing the following transactions:

Sections	Requirements thereof
291 Provisions	The Board of Directors cannot exercise their power or do any act or thing which is directed or required, whether by this Act or any other Act or by the memorandum or articles of the Company, or otherwise to be exercised or done by the Company in General meeting.

293	In the case of a public company of its subsidiary private company the Board cannot do any of the acts specified clause (a) to (e) of Sub-Section (1) of Section 293, except with the consent of such company, in general meeting and in compliance with Sec. 293.
293-A	To make political contributions.
294-294AA	The Board can appoint a Sole-selling Agent or a Sole-selling purchasing agent of the company for any area except in compliance with Sec. 294 / 294 AA.

ANNEXURES

(2) Specimen Agenda of the First Board Meeting

AGENDA

1. Election of the Chairman of the meeting.
2. To produce the Certificate of Incorporation, the Memorandum and the Articles of Association.
3. Appointment of the First Directors.
4. Election of the Chairman of the Company.
5. Appointment of Managing Director. Secretary, Solicitors, Auditor and Bankers.
6. Adoption of the Company's seal.
7. Fixing a quorum for the Board of Meetings.
8. Consideration and approval of the opening of a Bank Account and its operation.
9. Fixing the financial year of the company.
10. Approval of the Statement of preliminary expanses by the promoters.
11. Authorising and adoption of the preliminary contracts and under-writing contract.
12. Authorising the Secretary to purchase books and registers.
13. Consideration and approval of the draft of prospectus.

14. Consideration of the application to the stock exchange for the listing of shares.
15. Any other business.
16. Fixing the date of the next Board meeting.

ANNEXURE

SPECIMENS OF NOTICE AND AGENDA

(1) Specimen Notice of the First Board Meeting

ROYAL MANUFACTURING CORPORATION LIMITED

19, Royal Buildings,
Circular Road,
Madras.
Dated the 12th June, 19

To
(Director)

Dear Sir/Madam,

I have to inform you that the first meeting of the Board of Directors will be held at the Registered Office of the Company on 4th July 2006, at 3 p.m. to transact the business as per the enclosed agenda.

You are requested to please attend the meeting.

Yours faithfully,

Secretary.

Review Questions

1. Explain the requirements of Companies Act regarding Board Meetings.
2. Elucidate the duties of Company Secretary regarding convening of Board Meetings.
3. Outline the provisions of Companies Act regarding the recording and signing of Minutes of Proceedings of Board Meetings.
4. State the secretarial procedure for passing resolution by circulation.
5. Describe the procedure for keeping minutes of Board Meeting
6. Draft the specimen notice for holding first Board Meeting.
7. Draft an Agenda for holding the first Board Meeting.

LESSON – 4

COMPANY MEETING - IV

Lesson Outline

- ✦ Resolutions
- ✦ Special Resolution
- ✦ Matters requiring special resolution
- ✦ Registration of certain Resolution and Agreements: (Sec. 192)
- ✦ Resolutions requiring special notices
- ✦ Cases where special notice is required
- ✦ Circulation of Members Resolution
- ✦ Board's Resolution by Circulation
- ✦ Drafting of Resolutions
- ✦ Secretarial Duties

RESOLUTIONS

When something is proposed as a proposition is formally made at a meeting, it is called a motion. Anything proposed, i.e., the motion, need not be adopted as it is. It may undergo alterations and amendments. A motion when adopted becomes a resolution. It can, therefore, be stated that decisions of a company, in meeting are made by resolution.

A valid resolution can be passed only at the meeting which has been duly convened and duly constituted with the requisite quorum. After the motion is proposed and seconded, it is put to the meeting by the members or the chairman. The persons personally, i.e. barring those present as proxies, present and entitled to vote, cast their votes by show of hands, ie. by raising their hands 'for' or 'against' the motion when the question is put by the chairman. If the requisite number of persons vote in favour of the motion, it becomes a company resolution.

The resolution may be passed at any meeting of the company. However, the most important are resolutions passed at:

(a) Meeting of directors, and

(b) Meeting of members.

It may be stated that directors' resolution do not go by any special names and they generally require a simple majority of votes for their adoption.

1. Appointment of Sole Selling Agents Sec. 294
2. Remuneration payable to Directors Sec. 309
3. Investment in any other body corporate Sec. 372 (4)
4. Voluntary winding up Sec. 484 (1).

SPECIAL RESOLUTION

A Special resolution is one in regard to which the intention to propose the resolution as a special resolution is specifically mentioned in the notice of the general meeting, and which is passed by such a majority that the number of votes cast in favour of the resolution is three times the number of votes cast against it, either by a show hands or on a poll in person or by proxy.

The purpose of a special resolution is to ensure that various important matters affecting the constitution administration and affairs of a company are decided after due deliberations and with the consent of a large number of shareholders present at the meeting in person or by proxy.

Matters requiring Special Resolution

(a) To alter the provisions of the memorandum so as to change the place of registered office from one state to another, or to change the objects of the company — Sec. 17.

(b) To remove the registered office of the company outside the local limits of the city, town or village in which it is situated — Sec. 146.

(c) To change the name of the company with the approval of the central government — Sec. 21.

(d) To alter or add to the Articles of Association — Sec. 31.

(e) To change the name by omitting "Limited" or 'private limited' with the permission of the central government — Sec. 25(3).

(f) To determine that any portion of the uncalled share capital shall not be called except at the time of winding up — Sec. 99.

(g) Reduction of Share Capital — Sec. 100.

(h) Variations in the rights of special classes of shares. Sec. 106.

(i) Payment of interest out of capital — Sec. 208.

(j) Investigation of affairs of the company by inspectors appointed by central government— Sec. 237.

(k) Determination of the remuneration payable to any director Including managing director — Sec. 309.

(l) To authorise director/his relative to hold office of profit —Sec, 314.

(m) To alter the Memorandum so as to render unlimited, the liability of its directors or manager — Sec. 323.

(n) To authorise inter-company loans — Sec. 370 ~ and extension of time for repayment of loans — Sec. 370-A.

(o) To obtain an order from the Court for the winding up a company —Sec. 433.

(p) Voluntary winding up of the company — Sec, 484.

(q) To direct the matter of disposing of a company's books and papers on the completion of a member, voluntary winding up — Sec, 550.

(r) To commence new line of business — Sec. 149.

(s) Appointment of auditors in certain cases — Sec. 224A.

(t) Appointment of sole-selling agents in certain cases — Sec. 244 AA (3).

Registration of certain Resolution and Agreements: (Sec. 192)

A certified copy under the signatures of an officer of the company of the following resolutions and agreement must be registered with the Register within 30 days after passing a making thereof :

✦ Special Resolution.

✦ Resolution which have been agreed to by all the members of a company, but which, in the absence of such an agreement, would have to be passed as special resolutions.

- Any resolution of the Board of Directors or agreements executed by a company relating to the appointment, re-appointment or variation of the terms of appointment of a managing director.
- Resolutions or agreements which have been approved by all the members of a class of shareholders and all resolutions and agreements which bind all the members of a class of shareholders though not approved by all those members.
- Resolutions passed by a company conferring powers under Sec. 293 upon its directors, for example

  [i] to sell or lease the whole or substantially the whole of the company's undertaking,

  [ii] to borrow money beyond the limit of the paid up capital plus free reserves of the company or

  [iii] to contribute to charities beyond Rs. 50,000 or 5 per cent of the average net profits for the last three financial year, whichever is greater.
- Resolutions approving the appointment of sole-selling agents under Sec. 294 or Sec. 295 AA.
- Resolution requiring the company to be wound up voluntarily passed En pursuance of Sec, 484.
- Copies of the terms and conditions of appointment of a sale selling agent appointed under Sec. 294 on Sec. 294 AA.

If default is made in complying with this provision, the company and its every officer who is in default shall be punishable with fine which may extend to twenty rupees for every day during which the default continues.

Resolutions requiring Special Notices

Where special notice of a resolution is required by the Act or the articles of a company, the intention to propose such a resolution must be non lifted by the proposer to the company at least 14 days before the meeting. Immediately after receipt of such a notice the company in its own turn must give a notice of not less than 7 days before the meeting to its all members either by advertisement in a newspaper having an appropriate circulation on by any other mode allowed by the articles.

Cases where Special Notice is required

By virtue of the companies act, 1956, Special Notice is required in the following matters :

(a) In a resolution at an annual general meeting to provider expressly that the retiring auditor will not be reappointed — Sec. 225 (1).

(b) For a resolution at an annual general meeting appointing art auditor, a person other than a retiring auditor - Sec. 225 (1).

(c) For a resolution to remove a director before the expiry of his period of office - Sec. 284.

(d) For a resolution to appoint another director in place of the so removed director - Sec. 284.

Circulation of Members Resolution

Sec. 188 of the companies Act requires the circulation of members resolutions and other statement to all members entitled to receive notice of general meetings, if requisitioned by members of some members intending to move resolution be given to members of the company eligible to receive notice of the next annual general meeting, a written requisition for the same may be sent to the company, the members may require the company to circulate to members any statement of not more than one thousand words with regard to the matters referred to in any proposed resolution or the business to be dealt with at that meeting (188(1)

The requisition for the circulation of any such resolution or statement must be made by

- ✦ such number of members as represent not less than 1/20 of the total voting power of ail members having voting right on the resolution or business to which the requisition relates; or
- ✦ not less than 100 members having such voting right and holding shares in the company on which not less than rupees one lakh has been paid up in the aggregate Sec. 188 [2].

Notice of any such resolutions must be circulated to the members who are all entitled to receive notice of the meeting by sending a copy of resolution or statement along with the notice, as soon as possible afterwards. Sec. 188(3)

The requisitionists are required to deposit with the requisition sum payable with the company at least six weeks before the holding of the meeting at which the resolution is intended to be moved. This requirement is in connection with the requisition requiring a notice of a resolution Sec. 188 (4).

The company shall also not be bound to circulate any statement if, on the application of the company, or any other aggrieved person, the company Law Board is satisfied that the right of the members under this section is being abused to secure needless publicity of any defamatory matter. The Company Law Board may also order that the cost incurred by the company on the application be paid by the requisitionists 188 (5).

A banking company need not circulate such statement if such circulation is in persons to its interests 188 (6).

This section, lowerer applies to members resolutions intended to move at an annual general meeting and not any other general meeting 188(7).

Of default is made in complying with the provision of this section every office of the company who is in default shall punishable with fine upto Rs. 3,000 (188 (8).

Board's Resolution by Circulation

Regulation 81 of the Table A permits Board's Resolution by circulation which lays down. "save as otherwise expressly provided in the Act, a, resolution in writing, signed by all the members of the Board or of a committee. thereof, for the time being entitled to receive notice of a meeting of the Board or committee, shall be as valid and effectual as if it had been passed at a meeting of the Board Committee, duly convened and held".

The passing of resolutions by circulation, however does not disperse with the statutory requirement of holding Board meetings at least once in every three months. Where a resolution is passed by circulation. If should be posted in the minute book and at the next board meeting a minute may be recovered with reference to the resolution passed by circulation.

Moreover, there are some matters in respect of which a resolution, cannot be passed by circulation. Sec 292 of the Act provides that the following powers of the company, shall be exercised by the Board of Directors only by passing resolutions at duly constituted Board meeting:

(a) A power to make calls on shares.
(b) the power to issue debentures.
(c) the power to borrow money's otherwise than on debentures,
(d) the power to invest the funds of the company and
(e) the powers to make loans.

Then in respect of any of the above mentioned matters, a resolution cannot be passed by circulation. It has to be passed by a resolution adopted in a Board Meeting. However, Sec. 292 empowers the Board to delegate the powers under classes (c) (d) and (e) above to a committee of directors managing director, manager or any other principal officer of the company, subject to certain restrictions.

Drafting of Resolutions

A resolution should be in writing and should be carefully drafted. It is the duty and responsibility of the Secretary to get the resolution to be drafted in a language which is lucid and free from ambiguity. If the resolutions is to be passed pursuant to any provision of the companies Act or the Articles of the company, the relevant section of the Act on the regulation of the Articles should be mentioned.

A resolution may be drafted in a number of styles. In general, a resolution consists of two parts. The first part, the 'preamble' part, explain the reasons of the resolution and usually begin with the word 'whereas'. The second part, or the operative part, is the resolution itself. It spells out the decision arrived at the meeting, and always begin with words 'Resolved that

A resolution may be intended to bring into effect the desired state of affairs from the date of passing the resolution or from a future date where it is intended to make the resolution effective from the date of its passing, the words 'fe' and it is (they are) hereby "are included in the resolution where it is intended to make the resolution effective from a future date and the resolution is subject to certain contingency or completion of some formalities, the words, "be adopted subject to" are included in the resolution.

While drafting resolutions for both general meetings and Board meetings, the company secretary should keep in view the following important points :

1. A resolution must confine itself to only one subject-matter and two - different subject-matter should not be covered in one resolution.
2. A resolution must include all essential facts relating to the subject matter on which decision, in fund taken. If the decision in subject to the approval of the Central government, it should be clearly stated along with other consequential conditions of the decision,
3. If the resolution is one which requires the approval of the Central Government on the company Law Board on the court, it must be clearly stated. In case of a resolution of a Board meeting requiring approval of the general meeting, that should also be clearly stated.
4. The resolution must indicate the relevant Section (5) of the Act or provisions of the Articles and other applicable provisions of the Act and Rules, if any in pursuance of which the resolution in being adopted.
5. Reference to documents, agreements; etc., in the resolution must be stated definitely and the document should be clearly identified.
6. A resolution must indicate, if necessary, from when it will become effective.
7. Resolution which require action to be taken by the Board of Director or the Secretary must include or authorization to that effect.
8. A lengthy resolution should be divided into paragraphs arranged in logical order, each of which should begin with the words "further Resolved that"
9. Each resolution must be compute and explicit, and the intention of the resolutions must be clear and un ambiguous, so that anybody not present at the meeting or referring to it at a future date may know clearly the decision arrived at the meeting.

Secretarial Duties

The Secretary of a company has an important role not only with regard to drafting of resolution to be proposed by the company, but also with regard to circulation and filing of such resolution, where necessary. Some of the important duties of the secretaries are enumerated below :

(1). To carefully draft resolution to be moved at Board meetings in consideration with the Chairman.

(2). To draft resolution to be moved at annual or extra ordinary general meeting in consultation with the chairman and directors to get its approved at a Board meeting along with the notice of the meeting.

(3). To see that the intention to propose a resolution as a special resolution is duly mentioned in the notice of the general meeting where the resolution is to be proposed,

(4). In case of resolutions requiring special notice, to see that the notice of intention to move an ordinary as special resolution, received from the member concerned is in order and to arrange to issue notice of the resolution to members at least even days before the meeting.

(5). To see that the resolution requiring registration under Sec. 192 of the Act, along with the explanatory statement, if any, is printed and duly certified by officer of the company and filed with the Registrar within 30 days of the meeting.

(6). Where the Articles of the company are registered, to see that every resolution which alters the articles is embodied in or annexed to every copy of the articles. Where the articles are not registered, to forward a printed copy of such resolutions to any member on request and as payment of the requisite charge.

(7). To see that the requisition received in regard to circulation of members resolution or statement is duly signed by the required number of members as per Sec. 188 of the Act and is deposited at the registered office' along with the amount required to cover the expenses of the company, not less than 6 weeks or 2 weeks, as the case may be before the meeting. If satisfied, to circulate such resolution or statement among members entitled to receive notice of the meeting.

(8). Where a resolution is to be passed by the Board by circulation, to see that the draft resolution is circulated among the required number of directors at the proper addressers as per the provisions of Sec 289. Also to see that the resolution of the passing, is posted in the minute book and approved by the next Board meeting.

Review Questions

1. What is a 'resolution'? Explain the different kinds of resolutions passed at Company meetings.
2. State briefly the provisions of the Companies Act regarding the passing of 'ordinary and Special Resolutions',
3. Write Short Notes on:
   (a) Registration of Resolutions.
   (b) Resolution by Circulation.
4. Mention any five resolutions which require ordinary resolutions.
5. Under what circumstances do special resolutions become necessary?

LESSON - 5

DIRECTORS' RESPONSIBILITY STATEMENT AND COMPLIANCE CERTIFICATE

Lesson Outline

- Disclosures to be made in the Boards' Report of Board of Directors
- Directors' Responsibility Statement [Section 217(2AA)]
- Reasons for non-completion of buyback [Section 217(2B)]
- Comments on auditor's report [Section 217(3)]
- Information relating to unpaid deposits [As per directions of RBI]
- Disclosure of composition of audit committee
- Additional disclosure requirements for a listed company
- Documents attached with Board's report
- Compliance certificate
- Secretarial compliance certificate (Section 383A)

Disclosures to be made in the Boards' Report

The Companies (Amendment Act), 2000, has prescribed an additional duty on the Board of directors to include in the Board's report a 'directors' responsibility statement.

As per Section 217, Board's report shall be attached to every balance sheet that is laid before the company in general meeting. The Board's report shall contain the following particulars:

(1). Contents specified under section 217(1)
(2). Disclosure relating to conservation of energy etc.
(3). Changes during the financial year
(4). Disclosure of particular of certain employees
(5). Directors' Responsibility Statement
(6). Reasons for non-completion of Buyback
(7). Comments on auditor's report
(8). Information relating to unpaid deposits
(9). Disclosure of composition of audit committee.

Contents specified under section 217(1)

Section 217(1) requires the disclosure of following information in the Board's report:

(a) The state of the company's affairs

(b) The amounts proposed by the Board to be transferred to the reserves

(c) The amount recommended by the Board for payment of dividend

(d) Material changes and commitments, if any, affecting the financial position of the company which have occurred between the end of the financial year of the company and the date of Board's report. In other words, material changes subsequent to close of financial year shall be disclosed

(e) The conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as may be prescribed.

Disclosures relating to conservation of energy etc. [Section 217(l)(e)]

Clause (e) of section 217(1) requires that the Board's report shall disclose the particulars relating to the conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as may be prescribed. Accordingly, the Central Government has prescribed Companies (Disclosures of Particulars in the Report of Board of Directors) Rules. 1988. As per these rules, following particulars shall be disclosed in the Board's report:

(a) Conservation of energy

- Energy conservation measures taken
- Additional investment and proposals being implemented for reduction of consumption of energy
- Impact of the measures at (a) and (b) above for reduction of energy consumption and consequent impact on the cost of production of goods
- Total energy consumption and energy consumption per unit of production as per Form A of the Annexure to the Rules in respect of industries specified in the Schedule.

(b) Technology absorption

Efforts made in technology absorption as per Form B of the Annexure to the Rules.

(c) Foreign exchange earnings and outgo

- Activities relating to exports; initiatives taken to increase the exports; development of new export markets for production and services; and export plans
- Total foreign exchange used and earned.

Changes during the financial year [Section 217(2)]

As per section 217(2), the Board's report shall disclose the changes that have occurred during the financial year –

(a) In the nature of the company's business:

(b) In the company's subsidiaries or in the nature of the business carried on by them; and

(c) Generally in the classes of business in which the company has an interest. However, such disclosure is necessary only if it is not harmful to the business of the company or of any of its subsidiaries and it would result in better understanding of the state of the company's affairs.

Disclosure of particulars of certain employees [Section 217(2A)]

As per section 217(2A) read with Companies (Particulars of Employees) Rules, 1975 (as amended by Notification No. GSR 288(E), dated 17.4.2002), information is to be disclosed in the Board's report about the following employees:

(a) An employee who was employed throughout the financial year and received remuneration of Rs.24 lakhs or more.

(b) An employee who was employed for a part of the financial year and received remuneration of Rs.2 lakhs per month or more for any part of that year.

(c) An employee who was employed throughout the financial year or part thereof and received remuneration at a rate which, in the aggregate, is in excess of that drawn by the managing director or whole time director or

manager and holds by himself or along with his spouse and dependent children, not less than 2% of the equity shares of the company.

The term 'remuneration' has the same meaning as assigned to it in the Explanation to section 198.

Prescribed Particulars

In respect of every employee covered under section 217(2A), following particulars shall be disclosed:

- Designation of the employee.
- Remuneration received, including all allowances and perquisites.
- Nature of employment, whether contractual or otherwise.
- Other terms and conditions.
- Nature of duties of the employee.
- Qualifications and experience of the employee.
- Date of commencement of employment.
- Age of the employee.
- Last employment held by such employee before joining the company
- The percentage of equity shares held in the company by the employee along with his spouse and dependent children.
- Whether the employee is a relative of any director or manager of the company and if so, the name of such director or manager.

Directors' Responsibility Statement [Section 217(2AA)]

Directors' responsibility statement is aimed at highlighting the accountability of the directors with a view to ensuring good corporate governance. It will make the directors accountable to safeguard the assets of the company and to take positive steps in this regard. The directors' responsibility statement shall disclose the following particulars:

(a) **Compliance with Accounting standards.** That in the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures.

(b) **Consistent Accounting policies.** That the directors had selected such accounting policies and applied them consistently and made judgments

and estimates that are reasonable and prudent so as to give a true and fair view of the balance sheet and profit/loss of the company.

(c) **Due care**

That the directors had taken proper and sufficient care for –

- the maintenance of adequate accounting records in accordance with the provisions of this Act;
- safeguarding the assets of the company; and
- preventing and detecting fraud and other irregularities.

(d) **Going concern Assumption.** That the directors had prepared the annual accounts on a going concern basis.

Reasons for Non-completion of Buyback [Section 217(2B)]

The Board's report shall also specify the reasons for the failure, if any, to complete the buyback within the time specified under section 77A. The time specified under section 77A is 12 months from the date of passing the special resolution or the Board resolution authorizing the buyback.

Comments on Auditor's Report [Section 217(3)]

The directors of a company occupy a fiduciary position vis-a-vis its shareholder. Accordingly, the law requires that the Board's report shall give fullest information and explanations in respect of every reservation, qualification or adverse remark contained in the auditors' report. However, it is not necessary for the Board to amend the annual accounts to meet with the qualifications or observations of the auditors.

The auditor's adverse comments in terms of MAOCAR Order, 1988 form part of the audit report under section 227, and therefore the Board of directors is bound to give in its report fullest information and explanation on such comments [ICAI, Compendium of Statements & Standards of Auditing, 4th edition, 1995, p. A.I21, Para 78].

Information relating to Unpaid Deposits [As per directions of RBI]

The Reserve Bank of India has issued certain directions to be complied with by the Non-Banking Companies receiving deposits. As per these directions, the Board's report shall contain the specified particulars. The said particulars

shall be furnished with reference to the position as on the last day of the financial year to which the report relates. The specified particulars are as follows:

(a) The total number of accounts of public deposits which have not been claimed by the depositors or not paid by the company after the due date.

(b) The total amount remaining unclaimed or unpaid beyond the due date.

(c) If the amounts remaining unclaimed or unpaid exceed in the aggregate Rs. 5 lakhs, the steps taken or proposed to be taken by the Board of directors for the payment of the amounts due and remaining unpaid.

Disclosure of Composition of Audit Committee

The composition of the audit committee constituted by the company pursuant to section 292A of the Act shall be disclosed in the annual report. If the Board does not accept the recommendations of the committee, it shall record the reasons therefore and communicate such reasons to the shareholders. However, this requirement shall apply only to a public company having paid up capital of Rs.5 crores or more (Section 292A).

Additional disclosure requirements for a listed company

Report on corporate governance. Corporate governance aims to improve the company's image, efficiency, effectiveness and social responsibility. It deals with issues regarding transparency, integrity and accountability of the Board to the shareholders, general public etc.

To implement the concept of corporate governance, SEBI has advised all the stock exchanges to incorporate clause 49 in their listing agreement. As per clause 49, the annual report of the company shall include a separate section on report on corporate governance.

Documents attached with Board's Report

Compliance Certificate

Every company not required to employ a whole time secretary (i.e., a company whose paid up capital is Rs.10 lakhs or more but less than Rs.2 crores) shall file with the registrar a compliance certificate from a secretary in whole time practice stating therein whether the company has complied with all the

provisions of the Companies Act, 1956 or not. A copy of the compliance certificate shall be attached with the Board's report.

Secretarial Compliance Certificate (Section 383A)

Proviso to section 383A(1) read with Companies (Compliance Certificate) Rules, 2001 specify the following provisions:

(1). A company shall file with the registrar a secretarial compliance certificate if the following two conditions are satisfied:

  (a) It is not required to employ a whole-time secretary under section 383A(1).

  (b) It has a paid-up share capital of Rs.10 lakhs or more.

(2). The certificate shall be filed with the registrar within the prescribed time. The time prescribed is as follows:

  (a) 30 days from the date of annual general meeting; or

  (b) Where no annual general meeting is held, within 30 days from the last date on which the annual general meeting of the company ought to have been held.

(3). The certificate shall be issued only by a secretary in whole time practice.

(4). The certificate shall be addressed to the members of the company.

(5). The certificate shall be in the prescribed form.

(6). The certificate shall state as to whether the company has complied with all the provisions of the Companies Act. 1956.

(7). A copy of the certificate shall be attached with Board's report.

(8). Non-compliance shall be punishable with fine upto Rs. 500 for every day during which the default continues.

SPECIMENS OF RESOLUTIONS

Ordinary Resolution of General Meetings

(a) ***Adoption of Director's report and Accounts :*** "Resolved that the Director's report and Accounts for the year ended 31st December, 19...as audited and certified by the company's auditors and now

submitted to the meeting be and they are hereby approved and adopted"

(b) ***Removal of a Director :*** " RESOLVED that Shri......... director of the company regarding whose removal special notice has been received and has been duly heard as required by Sec. 284 (3) of the companies Act, 1956 be, and he is hereby, removed from his office as Director of the Company".

Special Resolutions of General Meetings

(i) Alteration of the Articles of Association

"RESOLVED that regulation ...... of the Article of Association of the company be altered as under:

Sub-clause ... of the regulation be omitted and the substituted by the following words ......"

(ii) Approving of a Director's holding office of profit.

"RESOLVED that pursuant to Sec. 314 (1) of the companies Act. 1956. Shri... director of the company be, and he is hereby, permitted to accept and hold an office of Profit as ... ... under the company notwithstanding that fact that he is a Director of the company, and that his office of Director shall not be vacated merely by reason of his accepting and holding such office of profit"

Convening a general meeting on requisition

"RESOLVED that a requisition under Section 169 of the Companies Act, 1956, having been received at the registered office of the company from the requisite number of members entitled to requisition a meeting, an Extraordinary General Meeting of the company be called on……at……at the Registered Office of the company to consider the following matters in the resolution;

1.......

2......."

Minutes of Statutory Meeting

MINUTES OF THE STATUTORY MEETING OF THE SHAREHOLDERS OF ....LTD. HELD ON ....DAY,............., 20....AT .... AT...................., MUMBAI.

Members Present

1. ....
2. ....
3. ....
4. ....
5. ....
6. ....
7. ....

Election of Chairman

Mr. .... proposed the name of Mr. .... to preside over the meeting. Mr. ....was elected unanimously.

Mr. .... took the seat and, quorum being present, called the meeting in order.

The Notice for convening the meeting was read out by the Chairman. The Statutory Report, having already been circulated, was ataken as read with the consent of the members present.

Adoption of Statutory Report

The following resolution was proposed for consideration and approval of the members:

"RESOLVED THAT the Statutory Report of the company as on ....duly authenticated by the Directors and the statutory auditors of the company as placed before this meeting be and is hereby received, considered and approved".

Mr. .... proposed the motion as an ordinary resolution.

Mr. .... seconded the motion.

The Chairman put the motion to vote by show of hand and thereafter declared the result as carried unanimously.

The Chairman declared: "There being no other item on the agenda. I declare the Statutory Meeting of the shareholders of the Company as closed".

Vote of thanks to the Chair was proposed by..

The chairman invited the members for joining him for tea/cold drinks.

(CHAIRMAN)

Minutes of Extraordinary General Meeting

MINUTES OF THE EXTRAORDINARY GENERAL MEETING OF THE SHAREHOLDERS OF .... LTD. HELS ON .... DAY,...... THE ...., 2005 AT .... AT .... , MUMBAI.

As per the Attendance Register .... members were present personally and .... by proxy.

On appointed time (............PM) the Chairman took the seat and requested the Company Secretary for confirmation of quorum.

The Company Secretary confirmed the quorum on the basis of the Attendance Register.

Thereafter the Chairman delivered his welcome speech and replied to all the queries raised by the shareholders.

After the Chairmen's speech, the Chairman requested the members to take up the Agenda item.

Item No.1

The Chairman moved the following for consideration and approval of the shareholders:

The resolution was read out by the Company Secretary.

"RESOLVED THAT pursuant to the provisions of section 149(2A) and other applicable provisions, if any, approval is hereby given to the company for commencing and undertaking the business as stated in sub-clauses (4B) and (16) of the Objects Clause of the Memorandum of Association."

Mr. .... proposed the motion as a special resolution.

Mr. .... seconded the motion.

The Chairman put the motion to vote by show of hands and thereafter declared the result as carried unanimously.

The Chairman declared: "There being no other item on the agenda I declare the Extraordinary General Meeting of the shareholders of the Company as closed."

Vote of thanks to the Chair was proposed by ....

The Chairman invited the members for joining him for tea/cold drinks.

Confirmation of Minutes

"RESOLVED THAT the minutes of the previous meeting of the Board of Directors of the Company held on ...., 20.... as placed before the Board be and are hereby confirmed and that the same be signed by the Chairman in token thereof."

Convening Extraordinary General Meeting

"RESOLVED that an Extraordinary General Meeting of the company be convened on .... 20 ....at.................AM at Hotel ...., ...for the purpose of considering the following resolution.

"RESOLVED that the regulations contained in the draft Article of Association submitted to the meeting and initialled by the Chairman for the purpose of identification be and are hereby approved and adopted as the Articles of Association of the company in substitution for, and to exclusion of, all existing article thereof'.

RESOLVED further that the draft notify for convening the Extraordinary General Meeting as placed before the meeting and initialled by the Chairman for the purpose of identification be and is hereby approved and that the Company Secretary be and is hereby authorised to give the notice of the meeting to all concerned".

Convening Annual General Meeting

"RESOLVED that an Extraordinary General Meeting of the company be convened on .... 20.... at ...... AM at Hotel ...., ..., for the purpose of considering the following resolution,

"RESOLVED that the regulations contained in the draft Articles of Association submitted to this meeting and initialed by the Chairman for the purpose of identification be and are hereby approved and adopted as the Articles

of Association of the company in substitution for, and to exclusion of, all existing articles thereof."

RESOLVED further that the draft notice for convening the Extraordinary General Meeting as placed before the meeting and initialled by the Chairman for the purpose of identification be and is hereby approved and that the Company Secretary be and is hereby authorised to give the notice of the meeting to all concerned."

Convening Annual General Meeting

"RESOLVED THAT the 10th Annual General Meeting of the Company for the financial year ended on 31st March, 1997 be convened on ...., 20.... at ....AM at Hotel ...., ..., ... and that the draft of the notice for convening the said meeting as placed before the meeting and initialled by the chairman for the purpose of identification be and is hereby approved and that the Chairman be and is hereby authorised to sign and circulate the same on behalf of the Board of Directors."

Review Questions

1. What is meant by Directors' responsibility Statement?
2. Explain the significance of Directors' responsibility Statement?
3. What are the matters to be included in the Directors' responsibility Statement?
4. What is meant by Compliance certificate?
5. Explain the gist of compliance certificate rules.

UNIT V

LESSON – 1

ACCOUNTS OF THE COMPANY

Objective

After reading this unit, the students should be able to understand the Preparation of Balance Sheet, Profit and Loss Account, Income and Expenditure Statement, Auditor's Report, Director's Report, Maintenance of Books of Accounts, Statutory Registers and Returns.

Lesson Outline

- Books of Account to be kept by Company (Sec. 209)
- Period of Preservation of Accounts
- Power to Inspect Books of Accounts
- Annual Accounts and Balance Sheet
- Form and contents of balance sheet and Profit and Loss Account (Sec. 211)
- Form and Contents of balance sheet and profit and loss account (Sec. 211)
- Profit and Loss Account etc. to be attached to Balance Sheet
- Copies of Balance Sheet, etc. to be sent to Members, etc.
- Filing of Balance Sheet etc, with the Registrar
- Annual Return
- Statutory Books and Registers
- Statistical books

As per the provisions of the Companies Act every company to keep proper books of account relating to its transactions and to make a disclosure of its financial position in the published accounts so that an appraisal could be made into the stats of affairs.

Books of Account to be kept by Company (Sec. 209)

Every company shall keep at its registered office, proper books of account with respect to

(a) all sums of money received and expended by the company and the members in respect of which the receipt and expenditure take place.

(b) all sales and purchases of goods by the company.

(c) in the case of a company engaged in production, processing, manufacturing or mining activities, such particulars relating to utilization of material or labour or other items of cost as may be prescribed by the Central Government, provided the Central Government so directs to any such class of companies or to any particular company.

When books are kept in other place in India, the Board of Directors may decide to that effect and their decision must be communicated to the Registrar in writing within seven days giving full address of that other place [Sec. 2091)].

Where a company has a branch office, whether in or outside India, the company shall be deemed to have complied with the provisions of sub section 17), if proper books of account relating to the transactions effected at the branch office are kept at that office and proper summarized returns made upto dates at intervals of not more than three months are sent by the branch of the company at its registered office or the other place referred to in sub section (1) [Sec. 209(2)].

Period of Preservation of Accounts

The books of account of every company relating to a period of not less than eight years immediately proceeding the current year together with the relevant vouchers must be preserved in good condition. [Sec. 209(4A)]

Power to Inspect Books of Accounts

The books of account and other books and papers shall be open to inspection by any director during business hours [Sec. 209(4)]. Members, however have no right of inspection unless provide in the articles.

Section 209A empowers the Registrar and any other officer authorized by the Central Government to inspect the books of account etc., without giving any previous notice to the company or any officer thereof.

It is obligatory on the part of every director, other officer or employee of the company to produce books of accounts etc., in his custody and to furnish information or explanation which the Registrar or the Inspecting Officer may

require in the course of inspection. The directors etc., are also required to give ail assistance.

Annual Accounts and Balance Sheet

At every Annual General Meeting held in pursuance of Section 166, the Board of Directors of the company shall lay before the company, a Balance Sheet and a Profit and Loss Account which shall relate.

(a) in the case of the first Annual General Meeting, to the period beginning with the day immediately after the period for which the account was last submitted and ending with a day which shall not precede the day of the meeting by more than six months or in cases where an extension of time has been granted for holding the meeting by more than six months and the extension so granted.

The period to which the Balance Sheet and Profit and Loss Account of any company relates is referred to in the Companies Act as a financial year. It may be more or less than a calendar year but must not exceed 15 months. The Registrar has to extend special permission to extend the 'Financial Year' to 18 months at the most. (Section 210[4])

The Inspection Officer has been authorised to make or cause to be made copies of books of account and other books and papers. The Inspector has also been invested with the power of a civil court in respect of production of books of account, etc., and summoning and enforcing the attendance of persons and examining them on oath.

Penalty for non compliance

The managing director or manager as the case may be responsible for the maintenance of proper books of accounts.

In other cases the responsibility is laid upon the directors or the person. if any to whom they have entrusted the job.

When the above said competent responsible persons for the maintenance of books of accounts have failed to take all reasonable steps to ensure compliance by the company with the requirements of this section (Sec. 209), he shall in respect of each offence, be punishable with imprisonment for a term which may be extended to six months, or with fine upto Rs.1000/- or with both (Sec. 209(5)).

If default is made in complying with the provisions of Section 209A discussed above in connection with 'power of inspection', every officer of the company who is in default shall be punishable with fine which shall not be less than five thousand rupees and also with imprisonment for a term not-exceeding one year.

Form and Contents of Balance Sheet and Profit and Loss Account (Sec. 211)

The Balance sheet of a company must give a true and fair view of the state of affairs assets and liabilities of the company as at the end of the 'financial year'. Similarly, the Profit and Loss Account must also give a true and fair view of the profit or loss of the company for the 'financial year'. 'Window Dressing', that is, showing a position better than it actually is or the other way-creating secret reserves would be contrary to the spirit of law.

The Balance Sheet and the Profit and Loss Account must be in the forms set out in Part I and II of Schedule VI of the Companies Act, respectively or as near there to as circumstances permit, or in such other form as may be approved by the Central Government. This provision does not apply to an insurance of a banking company or an electricity company (company engaged in the generation or supply of electricity) or to any other class of companies for which a form of Balance Sheet is specified under the special acts governing such class of companies.

The Section further empowers the Central Government to notify in the Official Gazette that a certain class of companies is exempted from compliance, in public interest, with any of the requirements in Schedule VI. The Central Government may also order, on the application of any company or with the comment of its Board of Directors, modification of any of the requirements of the Act as to the matters to be stated in the Company's Balance Sheet or Profit and Loss Account, so that those matters may be adapted to the circumstances of the company.

Authentication of Balance Sheet and Profit and Loss Account. Section 215 provide that in the case of a company other than a banking company, every Balance Sheet and every Profit and Loss Account must be signed on behalf of the Board of Directors by its manager or secretary, if any, and by at least two directors one of whom shall be a managing director where there is one When the

company has only one director for the time being in India, the Balance Sheet and Profit and Loss Account must be signed by such director, but in such a case there must be attached a statement signed by him explaining the reason as to why the other directors have not signed. In the case of a banking Company, they must be signed according to the provisions of the Banking Regulation Act, 1949.

The section further provides that the Balance Sheet and Profit and Loss Account must be approved by the Board of Directors before they are submitted to the auditors for their report thereon.

Profit and Loss Account etc. to be attached to Balance Sheet

There must be attached to every Balance Sheet a copy of each of

[i] the Profit and Loss Account (Sec 216)

[ii] the Auditor's Report (Sec. 216)

[iii] the Director's Report (Sec. 217) and

[iv] any accounts reports or statements as required by section 212 in respect of each of its subsidiaries, if any, if any company issues, circulates or publishes a copy of its Balance Sheet without attaching (hereto a copy of each of the aforesaid documents, then the company and its every officer who is in default, is punishable with a fine which may extend to Rs.500 (Sec. 218 (b).

Copies of Balance Sheet, etc. to be sent to Members, etc.

A copy of every Balance Sheet, together with a copy of Profit and Loss Account, Audi's; 's Report, Director's Report and every other document required by law to be attached thereto which is to be laid before a company in general meeting, must be sent atleast twenty-one days before the Annual General Meeting to every member of the company, to every trustees be debenture holders and to the auditors of the company. In order to reduce the cost of servicing the shareholders, a choice has been given to companies whose shares are listed on a stock exchange either to send copies of Balance Sheet together, with documents required to be attached thereto, or to send a 'statement containing the salient features of the documents' in the prescribed form (Form No. 23AB) duly approved by the Board of Directors and duly signed on behalf of the Board.

However, where a listed company has sent only the abridged form of Balance Sheet, etc, it must make available complete copies of Annual Accounts, etc, for inspection at its registered office during business hours for atleast 21 days before the date of the annual general meeting Further any member of debenture holder or depositor is entitled to have every other document required to be attached thereto. If any company fails to furnish a copy of Balance Sheet, etc, when demanded, within seven days thereof then the company and its every officer who is in default, is punishable with fine upto Rs.500. The Company Law Board may also order that the copy demanded shall be furnished forthwith (Sec. 219, as amended by the Companies (Amendment) Act, 1988).

Filing of Balance Sheet etc, with the Registrar

Section 220 provides that every company has to file with the Registrar, within thirty days of the Annual General Meeting, three copies of Balance Sheet and Profit and Loss Account together with three copies of all the documents which are required to be attached thereto. Even where the Annual General Meeting of the company for any year has not been held in time, the said copies of the Balance Sheet and the Profit and Loss Account, etc, must be filed with the Registrar, within thirty days from the latest day on or before which that meeting should have been held in accordance with the provisions of this Act [Amendment made by the Companies (Amendment) Act, 1977]. Each such copy of the Balance Sheet and the Profit and Loss Account must be signed by the managing director or manager and secretary or in their absence by a director of the company. It has been further provided that in the case of the private company, copies of the Balance Sheet and copies of the Profit and Loss Account shall be filed with the Registrar separately and a non-member shall not be entitled to inspect or obtain copies of the Profit and Loss Account. Again, in the case of a deemed to be public company under Section 43-A. Central Government may, in the public interest direct that a non-member shall not have access to the Profit and Loss Account.

In the event of the annual general meeting not adopting the Balance Sheet, or if the Meeting is adjourned without adopting the Balance Sheet, or if the Annual General Meeting of a company for any year has not been held, a statement of that fact and of the reasons therefore must also be attached to the Balance Sheet and to the copies there of required to be filed with the Registrar

(Section 220(2) as amended by the Companies (Amendment) Acts of 1977 and 1988).

Annual Return

Every company, having a share capital, is required to file with the Registrar's a ' Return' within sixty days from the day on which each of the annual general meetings is held. The Return should contain the particulars Specified in Part I of Schedule V of the Companies Act, as they stood on that day, in the prescribed form set out in part II of Schedule V, regarding the following :

(a) the registered office;
(b) the register of its members;
(c) the register of its debenture holders;
(d) its shares and debentures;
(e) its indebtedness;
(f) its members and debenture holders, past and present, and
(g) its directors, managing directors, managers and secretaries, past and present (Sec. 159).

The Department of Company Affairs added one more item to Part II of Schedule V of the Companies Act, 1956, vide its notification (No. GSR/1519, dated 15 October, 1976) published in the Gazette of India, dated 23 October, 1976. Accordingly, it has since become obligatory on the part of the company to include, inter-alia the following particulars in Annual Return ;

Names and addresses of and the number of equity shares (along with percentage of the total equity shares capital) held by each of the following, namely;

(a) Foreign collaborators. Foreign Financial Institutions and Foreign nationals.

(b) Governments and Government Sponsored Financial Institutions.

(c) Bodies corporate (not covered under (a) and (b) above)

(d) Directors and their relatives (as defined in Section 6), their shareholdings and directorships.

(e) Other top 50 shareholders (Other than those listed above)

Section 159(1) has been amended by the Companies (Amendment) Act, 1988, (w.e.f. 15-6-1988). Under the amended sub-section annual return is now required to be filed with full particulars required as to the past and present members and shares and held and transferred by them once in every six years, (instead of earlier once in every three years) and only the change in the list of shareholders or in the number of shares held by a member will be required to be filed in the returns for the intervening five years.

The copy of annual return to be filed with the Registrar must be signed both by a director and by the manager of secretary of the company, or if there is no manager or secretary, it must be signed by two directors of the company, one or whom shall be the managing director of the company where there is one. Further the annual returns in the case of companies whose share are listed on any Stock Exchange must also be signed by a Secretary in whole-time practice. (Sec. 161(1), as amended by the Companies (Amendment) Act. 1988).

There shall also be filled with the Registrar along with the Return a certificate signed by both the signatories of the Return, stating ;

1. that the Return States the facts as they stood on the day of the annual general meeting aforesaid, correctly and completely.
2. that since the date of the last Annual Return the transfer of all shares and debentures have been appropriately recorded in the books maintained for the purpose (Sec. 161 (2) and (a).

Every company, not having a share capital is also required to file with the Registrar a "Return" within the aforesaid time limit but it shall contain less details than the Return required to be submitted by a company having a share capital. (Sec. 160)

According to The Companies Unpaid Dividend (Transfer to General Revenue Account of the Central Government) Rules 1978, "every company shall also furnish a certificate along with its Annual Return stating that whole of the amount of dividend remaining unpaid or unclaimed for a period of three years from the date of transfer to the special account, namely," Unpaid Dividend Account " has been transferred to the General Revenue Account of the Central Government as required under section 205A (5).

The original copies of all Returns shall normally be kept at the Company's registered office and they shall be open to inspection for atleast two

hours a day during business hours by any member or debenture holder without fee and by other persons on payment of a fee of rupees ten for each inspection. The company is also required to supply to any person copies of Annual Returns of request, after charging the prescribed fee, within a period of ten days exclusive of non-working days. The Company Law Board is also empowered to order inspection of the document or direct to deliver the copy required thereof, if the company fails to comply with the above provisions (Sec. 163, as amended by the Amendment Act, 1988).

The Annual Returns shall be prima facts evidence of any matters directed or authorized to be inserted therein by the Act (Sec. 164)

Statutory Books and Registers

Every company is under statutory obligation to maintain the following books and registers at its registered office ;

(1). Register of Investments made by the company but not held in its own name (e.g. where a company holds shares in a wholly owned subsidiary company in the name of its nominee) under Section 49).

(2). Register of Charges, Section 143.

(3). Register of Members, under Section 150.

(4). Index of members, if the company has more than 50 members, unless the Register of Members is in such a form as will in itself constitute an Index, under Section 151.

(5). Register and Index of Debenture holders, under Section 152.

(6). Register of Foreign Members and Debenture holders, if any, under Section 157.

(7). Minute Books, under Section 193.

(8). Books of Account, under Section 209.

(9). Register of Contracts with companies and firms in which the directors of the company are interested, under Section 301.

(10). Register of directors, managing director (s), manager and secretary, under Section 303.

(11). Register of the Shareholdings of the directors, under Section 307.

(12). Register of loans etc, made to companies under the same management, under Section 370.

(13). Register of Investments made by the company in shares and debentures of other companies, under section 372.

Statistical Books

Besides the above statutory or compulsory books, other books and registers are also generally maintained by companies which are called 'statistical' or 'optional' or 'non-statutory books'. The following Statistical books are generally maintained by companies.

1. Share Application and Allotment Register
2. Share Call Register
3. Share Transfer Register
4. Debenture Application and Allotment Register
5. Dividend Register
6. Register of Share Warrants
7. Register of Certified Transfers
8. Debenture holders' Interest Register
9. Directors' Attendance Book
10. Register of Sealed Documents
11. Register of Power of Attorney
12. Register of Probates and Letters of Administration.

Review Questions

1. List the books of accounts to be maintained by a company under the Companies Act.
2. Explain the law relating to authentication, circulation, adoption and filing of annual accounts.
3. State the law relating to the preparation and presentation of balance sheet and Profit and loss account of a company.
4. Enumerate the secretarial duties with regard to circulation and filing of annual accounts of a company.

LESSON - 2

APPOINTMENT OF AUDITOR

Lesson Outline

- Appointment of Auditors: (Section 224 to 233)
- Appointment of Retiring Auditor (Section 224 (B))
- Appointment of an auditor other than the retiring one
- Removal of auditor before the expiry of the term of office
- Auditor of Government Companies
- Appointment of Auditor already having more than twenty audits
- Auditor appointed by the Central Government
- Appointment of Auditor in Casual Vacancy [Sec. (224(6) (a)]
- Appointment of Auditor in a Vacancy Caused by the Resignation of an Existing Auditor
- Special Audit (Sec. 233 A)
- Procedures for the Appointment of a Branch Auditor other than that of the Companies Auditor
- Cost Audit (Sec. 233-B)

The inherent complex nature and constitution of a company necessitates the compulsory audit of us accounts since the share holders, the real proprietors, are in general the absentee owner of the company. It is for this reason that the audit of the books of account of a company has been made Compulsory by the Companies Act. Nevertheless the audited accounts give a vivid picture to the creditors of the company, the financial position, based on which they could lend the company. The Company's Act provides for the employment of an auditor who is the servant of the shareholders and whose duty is to examine the affairs of the company on their behalf at the end of a year and report them whit he has found through a report.

Such examination by an independent agency such as auditor is practically the only safeguard which the share holders have against the enterprise being carried on in an unbusiness like way or their capital being misapplied or misappropriated without their knowing anything about it (Dy Secretary to Government of India, Ministry of Finance Vs. S. N. Dass Gupta AIR 1956)

Section 224 to 233 of the act contains various provisions relating to appointment, removal duties etc of a company auditor.

APPOINTMENT OF AUDITORS (Section 224 to 233)

Appointment of the First Auditor

The first auditor of a company shall be appointed by the board of directors within one month of registration of the company and the auditor or auditors so appointed shall hold office until the conclusion of the first Annual General Meeting. The auditor so appointed may be removed before the expiry of their term and another person may be appointed in their place by the company at a general meeting by passing an ordinary resolution to that effect, provided notice of any such proposed resolution is given to the members at least fourteen days before the date of meeting.

A board meeting must be called upon within one month of the incorporation of the company to hold office till the conclusion of the first Annual General Meeting and fixing his remuneration. When the Board fails to do so within one month after the incorporation of the company, a General Meeting must be convened after fixing up on the date, time, place and Agenda in a Board Meeting and pass Ordinary Resolution appointing the first auditor (Section 224 (5)).

If a General Meeting is held for this purpose, three copies of the notice and a copy of the proceedings of- the General Meeting must be forwarded promptly to the Stock Exchange with which the companies shares are listed The auditor must be intimated immediately about his appointment.

Appointment of Retiring Auditor (Section 224 (B))

An ordinary resolution must be passed in the Annual General Meeting, appointing the retiring auditor, and fixing his remuneration. The notice of the said meeting, containing the said agenda must be issued.

Three copies of the notice and a copy of the proceedings of the Annual General Meeting must b; forwarded to the stock exchange where the shares of the company are listed. The auditor must be informed of his appointment within seven days

In case of a company in which not less than 25% of the subscribed share capital is held whether singly or in combination by (a) public financial institution

or a Government Company or Central Government or any State Government or (b) any financial of other institution established by any Provincial or State Act in which a State Government holds not less than 51% of subscribed capital or (c) A Nationalized Back or an Insurance Company carrying on general Insurance business, the appointment or reappointment at each Annual General Meeting shall be made by a Special Resolution [Section 224(A)].

Appointment of an Auditor other than the Retiring one

A retiring auditor by whatsoever authority appointed, shall be automatically re-appointed, unless-

(a) be is not qualified for reappointment (i.e. he has incurred certain disqualifications by becoming a debtor of the company for over Rs. 1,000 or by accepting the office of profit in the company etc.)

(b) he has given to the company notice in writing of his unwillingness to be re-appointed.

(c) a resolution has been passed at that meeting appointing somebody instead of him or providing expressly that he shall not be re-appointed; or

(d) Where notice has been given of an intended resolution to appoint some person or persons in the place of retiring auditor, and by reason of death, incapacity or disqualification of that person, as the case may be, the resolution cannot be proceeded with (See. 224(2)]

A special notice indicating intention to move a resolution for changing the existing auditor of the company and for appointing another auditor in his place must be filed by the members in the ensuing Annual General Meeting. The special notice must be received by the company not less than fourteen days before the Annual General Meeting exclusive of the day on which the notice is served and the day of the meeting.

A copy of the aforesaid notice must be sent to the existing auditor of your company (Sec. 225 [I] and [2]). A written certificate from the proposed auditor to the effect that the appointment, if made, will be in accordance with the limits specified in (Sec. 224 [1-B]).

Issue notices of the Annual General Meeting staling about the special notice and proposing the Ordinary Resolution for change. State in the notice the fact about representations, if any, made by the auditor concerned and enclose the

copy of the representation. If the representations could rot be sent along with the notice for being received late, send the same later on (Sec. 225 [3]).

In case it is not possible to state about the special notice in the notice of the Annual General Meeting, then inform the members either by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the Articles of Association of the company not less than seven days before the meeting (Sic. 190 [2]).

Forward three copies of the notice to (be Stock Exchange with which the shares of your company are listed (Standard Listing Agreement)

Within seven days intimation must be given to the newly appointed auditor [Sec. 224(1)].

Removal of Auditor before the expiry of the Term of Office

For removing an auditor from office except the first Auditor, before the expiry of his term, previous approval of the Central Government must be, obtained.

A board nesting must be convened to approve the draft of the application to be sent to the Central Government for sanctioning the removal of the auditor (Sec. 224(7)).

An application shall be addressed to the concerned. Regional Director Company Law Board and must state the reasons in detail for the removal of the auditor and it must be accompanied by the following documents.

(a) A certified true copy of your company's Memorandum and Articles of Association.

(b) A treasury chalan demand draft evidencing the payment of the requisite fee prescribed under the Companies (Fees on Application) Rules 1968

(c) Reasons for removal of the auditor before the expiry of the term.

A copy of the application shall be sent to the concerned Registrar of Companies. On receipt of the approval, a Board Meeting must be convened, to fix the date, time, place and agenda of the General Meeting where the auditor will be removed.

The General Meeting must be convened and the auditor to be removed by passing an Ordinary Resolution after giving due notice of the meeting. A copy of the order of approval must be delivered to the concerned Registrar of Companies.

Remuneration of Auditors

The remuneration of the auditors of a company is fixed as follows :

1. In case he is appointed before the first Annual General Meeting or to fill casual vacancy by the directors, his remuneration is fixed by the Board of Directors.
2. In case he is appointed by the Central Government (including special auditor) his remuneration is fixed by (he Central Government.
3. In all other cases, his remuneration is fixed by the company in general meeting or in such manner as the company in general meeting may determine (Sec.224(8)).

It is said to be noted that any sums paid by the company in respect of the auditors expenses shall be deemed to be included in the expression remuneration.

Revision of the Remuneration of a Statutory Auditor

A Board Meeting to be convened lo take the decision of increasing the remuneration of the statutory auditor and to fix date, time, place and agende of the General Meeting (Sec. 224 (8) .b)).

A notice for the General Meeting proposing an Ordinary Resolution with suitable explanation for the increase of remuneration of the statutory auditor. The Ordinary Resolution must be passed in the meeting and the statutory auditor must be intimated such increase of remuneration. Three copies of the notices of meeting and a copy of the proceeding of the General Meeting must be forwarded to the Stock Exchange where the shares of the company are listed.

Auditor of Government Companies

The Auditor of a Government Company is appointed or reappointed by the Central Government on the advice of the Comptroller and Auditor General of India (Sec. 619 (.2)).

A certificate must be obtained from the auditor 10 be so appointed to the effect that such appointment, if made will be within the specified number as mentioned in the Explanation I of Section 224 (1C) (Section 224 (1B)).

The name of the person determined by the Central Government as the auditor of the Government company must be obtained on the advice of the Comptroller and Auditor General of India.

A Board Meeting must be convened to fix the date, time, place and agenda of the Annual General Meeting to be convened for the appointment of auditor by a Special Resolution (Sec. 224 (A) (I).

The Annual General Meeting shall be convened after giving appropriate notice. Three copies of the notice and a copy of the proceedings of the meeting must be forwarded to the Stock Exchange where the Government's Company's Shares are listed.

A copy of the Special Resolution must be filed with the concerned Registrar of Companies within 30 days of its passing in Form No. 23 after paying the requisite fee.

Within seven days of the appointment, intimation must be given to the auditor so appointed on the advice of the Central Government and the comptroller and Auditor General of India.

The company Secretary must see that me auditor, within thirty days of such receipt of intimation, gives notice to the concerned. Registrar of Companies in form No. 23B stating whether be has accepted or refused the appointment. (Sec. 224 (1A).

No filing fees is required for this notice.

Appointment of Auditor already having more than twenty audits

As per Section 224 (1-B) as amended by the Companies (Amendment) Act 1988, on and from 15th June 1988, a person in whole time employment elsewhere will not be eligible to be appointed as auditor of a company. Further the number of companies of which audit can be undertaken by in auditor or audit firm is restricted to twenty per each auditor or partner in an audit firm who is not in full time employment elsewhere. Out of these twenty companies, not more than ten could be companies having paid up share capital of rupees twenty five lakhs or more. Where any auditor of a firm of auditors is also a partner in any

other firm or firms of auditors, the overall ceiling in relation to such partner will also be twenty, so that he may not be able to take additional advantage by becoming a partner in more than one firm of auditors.

In case, the person is in part-time employment the restriction on the number of audits do not apply to him.

Again, if the person is in full time practice and is not in full time employment elsewhere, these restrictions on the number of audits do not apply to him.

If the person proposed to be appointed is practicing in his individual capacity, he can be appointed as auditor of any number of companies and his appointment need not be confined twenty companies.

Auditor appointed by the Central Government

When at any annual General Meeting no auditors are appointed or reappointed, the Central Government may appoint a person to fill the vacancy (Sec. 224 [3]).

A notice must be given to the Central Government by delegation to the Regional Director, within seven days from the date]0f Annual General Meeting stating that no auditor has been appointed or re* appointed in that meeting (Sec. 224 [4]).

The notice must contain the reasons for which no auditor could be appointed or re-appointed.

The following documents must be attached along with the notice.

a. A certified true copy of the proceedings of the General Meeting
b. A certified true copy of the Memorandum and Articles of Association of the company.
c. A certified true copy of the Annual Report

A copy of the notice along with a copy of each of the above documents must be simultaneously delivered to the concerned Registrar of Companies.

On receipt of the Central Government's order, the person whom the Central Government has directed to be appointed as the auditor of the company will be the auditor of the company and will hold office till the conclusion of the next Annual General Meeting.

Such Auditor will be paid remuneration as fixed by the Central Government.

Within seven days from the date of receipt of the Central Governments order intimation must be given to the person appointed as and for by the Central Government (Sec. 224 (1)).

The Secretary of the company must see that the auditor informs the concerned. Registrar of Companies by giving a notice in Form No. 23B within thirty days from the receipt by him of intimation of his appointment. No filing fee is required for giving the notice.

Further 619B empowers the Central Government to appoint or re-appoint auditors on the advice of the comptroller and Auditor General of India in the same mariner as is now adopted for Government companies as per Section 619. in all companies in which not less than 51 percent of the paid up share capital is held by one or more of the following or any continuation there of

(a) Government Companies
(b) Central Government
(c) State Government
(d) Corporation owned and controlled by the Stale Government of Central Government.

A certificate must be obtained from the auditor of such a company to the effect that such appointment, if made, will be within the specified number as mentioned in the Explanation I of Section 224 (1C) (Sec. 224 1B)).

The name of the person determined by the Central Government as the auditor of the company on the advice of the comptroller and Auditor General of India must be obtained by the company.

A board meeting must be held to fix the date, time, place and agenda of the Annual General Meeting to appoint the auditor by passing a Special Resolution (Sec. 224 A (1)).

The Annual General Meeting must be convened after giving due notice. If he shares are listed on a recognized. Stock Exchange forward promptly to the Stock Exchange three copies of the notice and a copy of the proceedings of the General Meeting.

A copy of the Special Resolution along with the Explanatory Statement must be filed with the concerned Registrar of Companies within thirty days of its passing in Form No. 23 after paying the requisite fee.

Within seven days of the appointment, intimation must be given to the auditor so appointed on the advice of the Central Government and Comptroller and Auditor General of India [Sec. 619 read with Sec. 224(1)].

It must be verified by the company that the auditor within thirty days of such receipt of intimation gives notice to the concerned Registrar of Companies in Form No. 23B stating whether he has accepted or refused the appointment (Sec. 224(1 A)]. No filing fee is required for giving this notice.

Appointment of Auditor in Casual Vacancy [Sec. (224(6) (a)]

The Act does not define what a casual vacancy is? A casual vacancy is a vacancy of a temporary nature which occur during the currency of the year after an appointment is made by the company at its General Meeting. A casual vacancy is therefore, not a vacancy created by any deliberate omission on the part of the company to appoint an auditor at its General Meeting. It denotes a vacancy caused by a validly appointed auditor ceasing to act as such (e.g.) due to death disqualification etc.

An auditor in a casual vacancy may be appointed by the Board of Directors. But where such vacancy is caused by the resignation of an auditor, the vacancy shall be filled by the company in General Meeting. Any auditor appointed in a casual vacancy shall hold office until (he next Annual General Meeting.

When the casual vacancy is not caused by the resignation of the auditor the auditor may be appointed in the casual vacancy in a Board Meeting by passing a resolution and fixing his remuneration.

A written certificate must bi obtained from the auditor to the effect that the appointment, if made, will be in accordance with the limits specified in. Section 224(B).

The auditor appointed in the casual vacancy must be intimated immediately of his appointment.

Appointment of Auditor in a Vacancy Caused by the Resignation of an Existing Auditor

A vacancy caused by the resignation of an Auditor must be filled in only at a General Meeting. At first a Board Meeting must be convened to fix the date, time, place and agenda for holding a General Meeting and passing an Ordinary Resolution to appoint the auditor in the casual vacancy.

A written certificate must be obtained from the auditor to the effect that the appointment, if made, will be in accordance with the limits specified in Section 224 (IB)

The General Meeting must be convened after giving due notice and an Ordinary Resolution must be passed. The auditor so appointed must be intimated of his appointment.

Three copies of the notice and a copy of the proceedings of the General Meeting must be promptly forwarded to the Stock Exchange with which the shares of the company are listed.

SPECIAL AUDIT (Sec. 233 A)

The Central Government may at any time, by order direct that a 'special audit' of the company's accounts for such a period as may be specified in the order shall be conducted if it is of the opinion that

(a) that the affairs of the company arc not being managed in accordance with sound business principles or prudent commercial practices or

(b) that the company is being managed in a manner likely to cause serious injury or damage to the interest of the trade, industry or business to which it pertains or

(c) that financial position of the company is such as to endanger solvency.

For this purpose, the Central Government may appoint a Chartered Accountant or the company's auditor himself may be directed to conduct such special audit. The auditor so appointed is called a 'special auditor'. The special auditor shall have the same powers and duties as an auditor of the company has under the Act, except that he shall make his report to the Central Government instead of member of the company.

It must be veri6ed whether an order of the Central Government directing a special audit of the company's accounts has been received by the company for such period or periods as may be mentioned in the order.

The Central Government may appoint by a separate or the same order appoint a Chartered Accountant or the company's Statutory Auditor aş the special Auditor (Sec. 233 A (1) & (2)).

A Board Meeting must be convened and a resolution must be passed to pay as determined by the Central Government the expenses of and incidental to any such special audit conducted by the special auditor (Sec. 233 A (7)).

On receipt of the report from the special auditor, the Central Government shall send to the company after four months of such receipt cither a copy of or relevant extracts from the report with its comments thereon and require the company either to circulate it to the member or have it read at the General Meeting (Sec. 233 A (6))

On receipt of such comments it must be circulated among all the members of the company after getting it printed. Such comments must also be read at the next General Meeting.

Branch Auditor

Where a company has a branch office, the accounts of that office shall be audited of the company's auditor or by any other person qualified for appointment as auditor of the company or where the branch office is situated in a country outside India either by the company's auditor or a person qualified as aforesaid by an accountant duly qualified to act as an auditor of the accounts of the branch office in accordance with the laws of that country (Sec. 228 (1)).

Where the accounts of a branch office are audited by a person other that the company's auditor, the company's auditor shall have the following rights.

(a) He shall be entitled to visit the branch office, if be deems it necessary to do so for the performance of his duties as auditor.

(b) He shall have a right of access at all limes to the books and accounts and vouchers maintained at the branch office.

Procedures for the Appointment of a Branch Auditor other than that of the Companies Auditor

A board must be called upon to fix up the date, time, place and agenda of a General Meeting to pass an Ordinary Resolution to the effect that the accounts of a particular branch of the company be audited by a particular auditor other than the company's auditor.

The General Meeting must be convened and the Ordinary Resolution must be passed to appoint the branch auditor or authorize the Board to appoint him in consultation with the company's auditor [Sec. 228 (3) (a)].

Three copies of the notice and a copy of the proceedings of the General Meeting must be forwarded to the Stock Exchange where the shares of the company are listed.

COST AUDIT (Sec. 233-B)

When a company engaged in production, processing, manufacturing or mining activities is directed, under Section 209, by the Central Government to include in its books of account such particulars as relating to the utilisation of material, labour and other items of cost. the Central Government may, whenever it thinks necessary, direct that an audit of cost accounts of the company shall be conducted.

A cost auditor shall be appointed by the Board of Directors of the company with the previous approval of the Central Government.

Upon the receipt of the approval of the Central Government under Section 233B (1) the name of the Cost Auditor shall be determined at a Board-Meeting. A resolution sanctioning the proposal for making the application to the Central Government to appoint a cost auditor shall be passed in the Board Meeting.

A written certificate must be obtained from the cost auditor to the effect that the appointment if made will be in accordance with the provisions of section 224 (1B) (Section 233 B(2) provision.

In order to get the approval of the Central Government for appointing the cost auditing an application must be filed to the Central Government in Form No. 23C (Sec. 233 (B) (2)).

The application must be sent along with a treasury challan or demand draft acknowledging the payment of requisite fees prescribed under the Companies (fees on Application) Rules 1968.

The copy of the application together with a copy of all the documents to be attached must be delivered to the concerned Registrar of Companies.

After that the Cost Auditor may be appointed in a Board Meeting by passing an ordinary resolution.

The cost Auditor must be intimated about his appointment. A certified true copy of the approval of the Central Government to be delivered to the concerned Registrar of companies.

SPECIMEN RESOLUTIONS

Adoption of Directors' Report and Accounts

'RESOLVED that the Directors' Report and Accounts for the year ended 31st December, 20...., as audited and certified by the Company's auditors and now submitted to the meeting be, and they are hereby, approved and adopted."

Appointment of an auditor other than the retiring auditor

"RESOLVED that Messrs……of……be, and they are hereby, appointed auditors of the company, to hold office from the conclusion of this Annual General Meeting, to the conclusion of the next Annual General Meeting, in place of Messrs……the retiring auditors, who have given the company notice in writing of their unwillingness to continue as the company's auditors, and that their remuneration be fixed at Rs……per annum."

Declaration of dividend

"RESOLVED that the dividend as recommended by the directors, viz...% free of income tax on the Equity Shares, for the year ended……20...., be, and it is hereby, declared, and that the said dividend be paid on or after....20....to those shareholders whose names appear on the register of Members on....20...."

Re-appointment of retiring auditors

"RESOLVED that Messrs......of...... the retiring auditors be, and they are hereby, re-appointed auditors of the company for the year....and that their remuneration be fixed at Rs……per annum, payable on the completion of audit."

Appointment of Cost Auditor

"RESOLVED that pursuant to the provisions of section 233B of the Companies Act, 1956 and the Central Government's order, directing the audit of company's cost accounts relating to .... for the year ended .... M/s. XYZ & Co., Cost Accountants be and are hereby appointed the cost of company at the remuneration of Rs. ....

RESOLVED further that an application be made to the Central Government for obtaining approval of the appointment of M/s. XYZ & Co., Cost Accountants, as the cost auditor of the company."

Approval of Accounts

"RESOLVED that the draft balance sheet of the Company as at 31st March, 20...... and the Profit and Loss Account for the year ended on that date as tabled at the meeting be and is hereby approved and that the same be signed by the Directors present in the meeting and the Company Secretary and that the same be forwarded to the auditors of the company for their report thereon."

Approval of Directors' Report

"RESOLVED that the draft Directors' Report to the members on the accounts for the year ended 31st March, 20..... and on the Company's operations after that day, as placed before the Board, be and is hereby approved and Shri .... Chairman and Managing Director of the Company be and is hereby authorised to sign the same on behalf of the Company's Board of Directors."

Adoption of Accounts

Ordinary Resolution

"RESOLVED that the Balance Sheet for the financial year ended .... and the profit and loss account ended on that along with the report of the Auditors' and Directors thereon, as placed before the meeting be and is here received, considered, approved and adopted.''

Note; In accordance with the provisions of section 173(1) of the companies Act, 1956, the adoption of accounts is an ordinary business for which no explanatory statement is required to be given in the notice.

Appointment of Auditor

TYPE OF RESOLUTION: Ordinary Resolution

"RESOLUTION that M/s, XYZ & Co., Chartered Accountants, be and are hereby appointed as the Auditors of the company to hold office from the conclusion of this meeting to the conclusion of the next Annual General Meeting of the company on a remuneration of Rs..........................plus reimbursement of any out of pocket expenses that may be incurred by the said M/s. XYZ & C., for discharging their duties as Audit ors of the company".

Note: In accordance with the provision of section 173(1) of the Companies Act, 1956, the appointment of the auditor is an ordinary business for which no explanatory statement is required to be given with the notice.

Review Questions

1. Who can be appointed as an auditor of a company?
2. Who can not be appointed as an auditor of a company?
3. State the secretarial procedure for appointment of an auditor in a casual vacancy?
4. Describe the procedure for appointment of an auditor of company in which 25% of the subscribed capital is held by LIC of India.
5. When are auditors of a company required to be appointed by a special resolution.
6. How is the first auditor of a company appointed?
7. Write short notes
   a. Special audit
   b. Cost Audit

UNIT VI

LESSON - 1

VOLUNTARY WINDING UP

Objective

After reading this unit, the students should be able to understand the Procedures for various modes of Winding up, Members and Creditors Voluntary Winding up, Compulsory Winding up by Court, Specimen Resolutions.

Lesson Outline

- Meaning of winding up
- Kinds of Winding up
- Voluntary winding up
- Members' Voluntary Winding Up
- Secretary's duties in respect of Member's Voluntary Winding Up:
- Creditors' Voluntary Winding Up — Procedure
- Secretary's duties in respect of Creditors' Voluntary Winding Up

Meaning of Winding up

Winding up means the process of putting an end to the life of company. It is also known as liquidation.

According to Prof. Gower, winding up of a company is, "the process whereby its life is ended and its property is administered for the benefit of its creditors and members. An administrator, called a liquidator, is appointed. He takes control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their rights".

Thus, the process of winding up takes the following steps:

(a) A Liquidator is appointed for the purpose

(b) He takes control of the company

(c) The assets of the company are realized.

(d) The debts of the company are paid off.

(e) If there is a deficiency to meet out its debts, the contributories (hitherto 'shareholder') are made to pay their dues on unpaid portions of their shares.

(f) If surplus exists after paying off its entire debts, it is distributed to the contributories according to their rights.

(g) After completing the above said task, the liquidator sends final report to the Registrar of Joint Stock Companies with a recommendation to remove the name of the company from the ' Register of Companies'.

(h) The Registrar takes away the name of the company from the 'Register of Companies', if he is thoroughly satisfied with the liquidation procedure.

Kinds of Winding up

The following are the different kinds of winding up:

1. Voluntary winding up
2. Compulsory winding up
3. Winding up, subject to the supervision of the court.

VOLUNTARY WINDING UP

Meaning: Voluntary winding up means winding up by members or creditors of a company without the intervention of the court. In other words, the members and creditors are left free to settle their affairs without going to the Court of law. However, they may seek direction from the court, if and when it is necessary.

Section 484 of the companies Act states the conditions under which a company may be wound up voluntarily. They are as follows:

(i) By an Ordinary Resolution

(ii) By a Special Resolution

(i) By an Ordinary Resolution: By passing an ordinary resolution in the general meeting of the company for its voluntary winding up, a company may be dissolved as per the provisions of its Articles of Association.

For eg.:

a) On the expiry of a specific period, if the Articles fixes the duration of the company;

b) On the occurrence of some event, if the Articles provides so.

(ii) By a Special Resolution : By passing a Special Resolution in the general meeting of the company, it may be wound up voluntarily. In this case no reason is required and even if the company is prosperous, it would be wound up. Within 14 days of the passing of such a resolution (ordinary or special), the company must give a notice of the resolution by advertisement in the Official Gazette and also in some news papers circulating in the district where the registered office of the company is situated [sec. 485,(i)].

Specimen of Notice of General Meeting to Pass Special Regulation for Voluntary Winding up

[Pursuant to Sec. 484(1) (b)]

X. Y. COMPANY LIMITED

Registered Office: 30, Main Road, Karaikudi-3.

Notice is hereby given that the Extra-ordinary General Meeting of the above named company will be held at on day of 19 at a.m. / p.m. for the purpose of considering and, if thought fit, passing the following resolution which will be proposed as a special resolution.

"That the company be wound up voluntary and that Shri. ....of .... be, and is hereby, appointed liquidator for the purpose of such winding up and that his remuneration be and is hereby, fixed at Rs. .... per month, (or per annum)".

By order of the Board.

Dated **Signature of Managing Director/Secretary.**

Specimen of Resolution to Wind up Voluntarily

[Pursuant to Sec. 485(1)]

In the matter of Companies Act, 1956

and

X. Y. COMPANY LIMITED

At an Extra-ordinary General Meeting of the above named company duly held at on day of 19 the following resolution for the voluntary winding of the company was duly passed as a special resolution.

"That the company be wound up voluntarily, and that Shri. .... of .... be, and is hereby, appointed liquidator for the purpose of such winding up, and that his remuneration be, and is hereby, fixed at Rs. .... per month (or per annum)".

Dated **Signature of Chairman**

Commencement

The voluntary winding up is deemed to commence from the date of such resolution. After that the company shall not carry on any business except certain activities which may be necessary for the beneficial winding up (Sec. 486).

Kinds : The voluntary winding up may be either

(i) Members Voluntary winding up ; or

(ii) Creditors' Voluntary winding up.

MEMBERS' VOLUNTARY WINDING UP

The following is the procedure for Members' Voluntary winding up:

(i) Declaration of Solvency (Sec. 488) : When a majority of the members of the Board of Directors of the company satisfy themselves that the company is solvent and is able to pay its debts in full, they give the declaration of solvency, stating that the company is able to pay its debts in full with in a period, not exceeding 3 years from the commencement of winding up. This declaration which contains a statement of assets and liabilities, is filled with the Registrar within 5 weeks (i.e. 35 days) immediately before the date of passing the resolution for winding up of the company.

(ii) Meeting of the Members : After having given a declaration of Solvency', the directors arrange to held the meeting of the members for the purpose of passing the resolution for winding up.

(iii) Publication the Resolution : The resolution so passed is to be advertised within 14 days of passing it in news papers of the district as well as in the official Gazette.

(iv) Appointment of Liquidators (Sec. 490) : The company, in its general meeting, appoints one or more liquidators for the purpose of winding up by fixing the remuneration of such liquidator. The remuneration once fixed cannot be increased for any reason. Before the fixation of remuneration, no liquidator / liquidators shall take charge as such.

(v) Transfer of Control (Sec. 491): On the appointment of liquidator, all the powers of the Board of Directors and other executive cease, except when the company in general meeting or the liquidator may sanction them to continue.

If any vacancy arises in the office of the liquidator (by death or resignation), the company, in general meeting can fill that vacancy (Sec. 492), (Since the Board of directors ceases to function, either the liquidator (existing) or contributories may arrange to hold the general meeting of the company.)

(vi) Notice of appointment of liquidator to Registrar (Sec. 493) : The notice of appointment of liquidator or liquidators, must be given to the Registrar within 10 days of such appointment. It is also applicable even if a vacancy is filled in.

(vii) Liquidator's Power to accept shares, debentures, etc. (Sec. 494): The liquidator, if authorised by a special resolution, may accept shares, debentures, etc of the transferee company in consideration of the transfer or sale of the properties (wholly or partly) of the company under liquidation, (it is known as a scheme of reconstruction or amalgamation).

(viii) Calling for Creditor's meeting (Sec. 495) : If the liquidator feels that the company is not able 10 pay its debts in full (within the period stated in the declaration of solvency, he has to call for the meeting of the creditors forthwith and submit a statement of assets and liabilities of the company. (Then the winding up becomes creditors' winding up). Failure to convene such a meeting, the liquidator is punishable with a fine.

(ix) Convening General meeting at the and of the year (Sec. 496) : If the winding up proceedings continue for more than a year, the liquidator should call the general meeting at the end of the first year and at the end of each subsequent years. He has to present before the meeting an account of his acts and dealings and the progress of winding up during the year. Failing to comply with this provisions, he is punishable with a fine.

(x) Final Meeting and dissolution : Soon after completing the affairs of winding up, the liquidator must take an account of liquidation showing the manner in which the proceedings are conducted and the assets of the company disposed of. Then he must call the general meeting of the company and submit the above said account of winding up. This is the final meeting of the company.

Within one week (i.e. 7 days) after the meeting, he has to send a copy of the account and of the return of the meeting to the Registrar and to the Official Liquidator.

On receipt of the account and the return, the Registrar registers them. The Official liquidator makes a scrutiny of the books and other documents of the company. Alter the scrutiny, he reports to the court the result of his scrutiny.

If the report of the Official Liquidator states that the affairs of the company were conducted without prejudice to the interest of the members or public interest, then the company is deemed to be liquidated from the date of the submission of the report to the court.

If the report shows that the affairs of the company were conducted in a manner prejudicial to the interest of its members or to public interest, the court shall direct the official liquidator to make further investigation of the affairs of the company. After the receipt of the report of further investigation, the court will act according to the facts revealed in that report.

Specimen of Declaration of Solvency in a Members' Voluntary Winding up

DECLARATION OF SOLVENCY

We .... of .... being all/the majority of the directors of .... Company Limited hereby declare that we have made full inquiry into the affairs of the Company and, having done so, we have formed the opinion that this Company has no debts/will be able to pay its debts in full within .... years/months (not exceeding 3 years) from the date of the commencement of the winding up.

Affidavit

We .... of .... solemnly affirm that the declaration made herein is true to the best or our information and belief.

(Signatures of Directors)

Solemnly affirmed by the above-named directors at the day .... of .... 19 .... before me.

NOTICE FOR FINAL MEETING AND DISSOLUTION OF COMPANY

(Pursuant to Sec. 497 (2))

In the matter of the Companies Act, 1966

And

in the matter of ....Limited

(In Voluntary Liquidation)

Notice is hereby given that an Extraordinary General Meeting of the members of .... Limited, will be held at the office of the Liquidator at .... A.M./ P.M. .... on .... the .... 19 .... to transact the following business.

To receive from the Liquidator accounts of the winding up of the Company and any explanations thereof and receive and approve the report of the Liquidator as to how the property of the Company has been disposed of and how the winding up has been conducted.

To consider and if though fit, to pass the following resolution as a special resolution :

"Resolved that the books of account, other documents and papers in possession of the Liquidator be destroyed by him after the expiry of the period of 6 months from the date of this resolution".

Date this day of Liquidator(s)

Notes :

(1) Any member entitled to, attend and vote is entitled to appoint a proxy to attend and vote instead of himself and such proxy need not be a member of the Company.

(2) The relevant explanatory statement pursuant to Sec. 173 of the Act is annexed herewith.

Secretary's duties in respect of Member's Voluntary Winding Up:

The following are the duties of the Company Secretary in case of members' voluntary winding up :

[i] To arrange for holding a meeting of the Board of Directors to consider the, winding up of the company.

[ii] To prepare the declaration of solvency, get it verified by an affidavit before a Magistrate and file it with the Registrar along with an audited Profit and Loss Account and Balance Sheet and a statement of assets and liabilities.

[iii] To arrange to hold an Extra-ordinary general meeting of the company to pass the resolution for voluntary winding up.

[iv] To prepare and issue notice of the Extra-ordinary general meeting where the proposed resolution for voluntary winding up is to be considered and passed.

[v] To see that the special resolution for winding up the company voluntarily is duly passed appointment of liquidator or liquidators is properly made and liquidator's remuneration is fixed at the meeting.

[vi] To see that the notice of the resolution for winding up passed at the meeting is published in some news papers of the concerned district and official Gazette within 14 days of passing of such resolution.

[vii] To file the copy of appointment of liquidator with the Registrar within 10 days of such appointment.

[viii] To see that the copy of the resolution for winding up is filed with the Registrar, along with an Explanatory Statement, within 30 days of passing such resolution.

[ix] To prepare a statement of affairs of the company, duly verified by affidavit and submit the same in duplicate to the liquidator within 21 days of the commencement of the winding up.

[x] To see that every invoice, order, letter-head, statement of account etc. bear the words 'Under Liquidation'

[xi] During the course of winding up, the Secretary has to assist the liquidator in all respect in order to carry out the proceedings smoothly.

CREDITORS' VOLUNTARY WINDING UP: Procedure

The question of Creditors' Voluntary Winding Up arises where the company is unable to pay its debts in full. Since the interest of the creditors is Involved, in such a case, they are given the option to wind up the company voluntarily. In other words, creditors' voluntary winding up emerges where the solvency declaration is not possible by the company.

Procedure: The procedure for Creditors' Voluntary Winding Up is laid down under sections 500 to 509 of the Act.

(i) Meeting of the Creditors (Sec. 500) : When it is proposed to wind up a company voluntarily, a meeting of the creditors should be called for on the same day or the day next following the day on which the members of the company are to meet for considering the resolution f6r winding up the company voluntarily creditors must be issued with the notice of the meeting, simultaneously with that of the meeting of the members.

The notice of the meeting is to be published in the Official Gazette and atleast in two leading newspapers of the district (in which the Company's Regd. Office situated.

The directors must present to the creditors, at the meeting

(a) a list of creditors;

(b) a statement of the financial position of the company and

(c) a statement of the claims of the creditors.

(ii) Resolution for winding up: A resolution for winding up of the company has to be passed by the creditors at their meeting. If the meeting is

adjourned for want of quorum, the resolution may be passed at the subsequent meeting for winding up of the company.

(iii) Copy of Resolution to Registrar (Sec. 507); Within 10 days from the passing of the resolution for winding up at the creditors' meeting, a copy of which is to be sent to the Registrar. Failure to do so a punishment is imposed with a fine on every officer concerned.

(iv) Appointment of Liquidator (Sec. 502) : The creditors and the members at their respective meetings appoint the liquidator for conducting the affairs of winding up.

If the creditors and the members appoint different persons as liquidators, the creditors' nominee shall be the liquidator.

(v) Appointment of Committee of Inspection (Sec. 503) ' The creditors at their meeting, if they think fit, will appoint a committee of inspections consisting of not more than 5 persons. In that case, the company, in its general meeting will also nominate not more than 5 members to the committee. But the creditors have a greater say in accepting such members.

If the creditors and the members do not agree on a common list, the court may, on an application for a direction, will constitute a committee of inspection.

(vi)Liquidators' Remuneration (Sec. 504): The committee of inspection or If there is no such committee, the creditors fix .the liquidators' remuneration. Once the remuneration is fixed, it cannot be increased in any case. If any remuneration is not fixed, the court will fix the liquidators' remuneration.

(vii) Board's Power to Cease (Sec 505); The powers the Board of Directors are to be ceased as soon as the liquidators are appointed for the purpose. But the committee of inspection, or if there is no such committee, the creditors, at their meeting, may sanction the continuance of the Board.

(viii) Liquidator to call meetings (Sec. 508): If the process of liquidation continues for more than a year, then the liquidator has to call for the meeting of the creditors every year and should present before the meeting an account of his acts and dealings and of the conduct of winding up during the preceding year and the position of liquidation.

(ix) Final Meeting and Liquidation (Sec. 505): On the completion of the winding up proceedings in full, the liquidator prepares an account of the winding

up showing how it has been carried out and the properties of the company were disposed of. He calls for the final meeting of the members as well as creditors of the company and presents the account of winding up before the meeting.

(x) Filing the Account and Returns : The liquidator has to send the copy of the account of winding up and returns to the Registrar and the official liquidator for their scrutiny and report. The other procedure is the same in the case of Members' Voluntary Winding Up.

Secretary's duties in respect of Creditors' Voluntary Winding Up

The following are the duties of the company secretary in case of Creditors' Voluntary Winding Up:

(i) To arrange for holding a Board meeting so as to fix the date, time, place and agenda of the general meeting of the company, where the resolution of winding up is to be considered and passed and the meeting of the creditors to be convened immediately thereafter.

(ii) To see that the Board meeting approves the draft resolution to be placed before the general meeting, besides nominating a direct to preside over the meeting of the creditors.

(iii) To prepare the notice of creditors' meeting and get it published in the Official Gazette as well as in at least two leading news paper in the district within 14 days of the said meeting,

(iv) To send notices of the general meeting and creditors' meeting to the members and creditors respectively, by post simultaneously.

(v) To prepare the Statement of Affairs of the company and the list of creditors for placing them before the creditors' meeting.

(vi) To see that the general meeting of the company is duly held and a special resolution for winding up of the company is duly passed.

(vii) To see that the appointment of liquidator is properly made and remuneration is fixed at the meeting.

(viii) To see that the creditors' meeting is duly held, the Statement of Affairs and creditors' list are duly placed before the meeting and a resolution approving the winding up, appointing a liquidator, fixing his remuneration are properly done thereat.

(ix) To file the copy of the resolution passed at the creditors' meeting, with the Registrar within 10 days of passing it.

(x) To see that the statement of affairs of the company duly verified by affidavit and submitted in duplicate to the liquidator within 21 days of the commencement of winding up.

(xi) To see that the notice of resolution passed for winding up is published in the Official Gazette and newspapers within 14 days of its passing.

(xii) To see that every invoice, order, document, etc should invariably bear the words "Under Liquidation"

(xiii) To assist the liquidator in all respect to carry out the winding up smoothly.

Review Questions

1. What is meant by Voluntary winding up of Companies?
2. Describe the Secretary's duties in respect of Member's Voluntary Winding up.
3. What is Creditors' Voluntary Winding up? Explain the Secretarial formalities for Creditors' Voluntary Winding up?
4. Draft a specimen of the notice of general meeting for passing the resolution for Voluntary Winding up.
5. Explains the different kinds of winding up of joint stock companies.

LESSON - 2
COMPULSORY WINDING UP

Lesson Outline

- ✦ Compulsory Winding Up — Meaning.
- ✦ Grounds for Compulsory Winding Up.
- ✦ Petition for Winding Up.
- ✦ Procedure for Winding Up.
- ✦ Committee of Inspection.
- ✦ Secretary's duties in respect of Compulsory Winding Up.

COMPULSORY WINDING UP

Meaning : Compulsory winding up means the winding up of a company by an order of the court. In other words, a company is compulsorily wound up and that too by the order of the court.

Grounds for Compulsory Winding Up : (Sec. 433)

The various grounds under which a company has to be compulsorily wound up are stated in Sec. 433 of the Companies Act. They are as follows:

(i) By a Special Resolution : Sec. 433 (a) : If a company passes a special resolution lo the effect that the company be wound up by the court the court may pass the order of winding up.

(ii) Failure to hold Statutory Meeting : (Sec. 433 (b) : When a company fails to hold the statutory Meeting (U/S. 165) or to deliver the Statutory Report to the Registrar, the court may order for winding up of such company on petition.

The petition can be made only after the expiry of 14 days on which the meeting ought to have been held.

(iii) Non-Commencement of Business - Sec. 43S(c) 3 In certain cases, the company may fail to commence business within one year from the date of its incorporation or suspends its business for a whole year. If the court satisfies itself that there is a fair indication or intention of non-commencement of business on the part of the company, then it may order for winding Up.

(iv) Fall in Membership-Sec. 433(d) : If the membership of a company falls below the statutory minimum, the court may order the winding up of the company.

(v) Unable to pay its debts - Sec 433 (e): When a company is not able to pay its debts (U/S 434), then it is ordered to be wound up by the court.

(vi) Just and Equitable - Sec. 433(f) : Sometimes the court thinks that it is just and equitable that a particular company should be wound up. In such cases, the court orders for winding up of the company under 'ejustem generis clause', which provides a wide discretionary power to the court.

The following are some of the grounds for application of this ejustem generis clause.

(a) If there is complete deadlock in the management of the company.

(b) When the main object of the company has failed to materialise.

(c) When it becomes impossible to carry on the business except on losses.

(d) When there is oppression towards minority interest.

(d) Where the company is incorporated for fraudulent or illegal purposes.

Petition for Winding up

An application (petition) to the court for compulsorily winding up a company is made by different persons. (Sec. 439).

(i) **Petition by the Company:** When a company passes a special resolution that it is to be wound up, it may present a petition in the court for its winding up.

(ii) **Petitions by the Creditors:** When a company is unable to pay its debts in full, the creditor or creditors may present a petition for winding up of the company.

(iii) **Petition by the Contributories:** A contributory can present a petition for winding up a company, if

(a) the membership is reduced below the statutory minimum ; or

(b) he is the original allottee of shares; or

(c) he has held the shares for at least 6 months during the 18 months immediately preceding the commencement of the winding up ; or

(d) he has held the shares by transmission.

(iv) **By the Registrar :** The Registrar of Joint Stock Companies can present a petition for winding up of a company on the following grounds :

(a) When the company fails to deliver the Statutory Report to the Registrar or to convene the Statutory Meeting.

(b) Failure to commence the business within the stipulated period or suspends business for a whole year.

(c) When the membership falls below the statutory minimum ;

(d) If the company is unable to pay its debts.

(e) If the court is of the opinion that it is just and equitable to liquidate the company.

(v) **Petition by any person authorised by the Central Government** (Sec. 243) : On the strength of the Inspection Report on the investigation into the affairs of the company (U/S. 235), the Central Government may authorize any person to present the petition to the court for winding up of the company.

Contents of the Petition: The petition should contain the following details:

(a) Name of the company and its date of registration.

(b) Address of the Registered Office ;

(c) Details of paid-up share capital.

(d) Statement of facts to justify a winding up order with a request to the court to issue an order of winding up.

(e) Statement in the form of an affidavit that the facts stated in the petition are true and correct.

Procedure for Winding Up

The procedure for compulsory winding up of a company is summarized as follows:

(i) Commencement: (Sec. 441) ; On the petition to the court by any of the afore said persons, entitled 10 present it, the winding up of the company is deemed to have commenced. However, if the company has passed a resolution for voluntary winding up before the presentation of the petition, the winding up is said to be commenced from the date of passing such resolution. (Sec. 486).

(ii) Publication of the Petitions': The petition presented to the court for winding up the company needs to be advertised 14 days before the hearing, with full details of the petition.

(iii) Power of the Court to restrain proceeding : (Sec. 442): At any time after the presentation of a winding up petition but before the winding up order, the company or a creditor or contributory may apply to the court for a stay of or restraint of further proceedings of winding up.

(iv) Powers of the Court on hearing petition: (Sec. 443): On hearing the winding up petition, the court can

[a] dismiss the petition with or without cost; or

[b] adjourn the bearing; or

[c] pass an interim order, if it thinks fit; or

[d] make an order for winding up the company with or without costs; or

[e] pass any other order as it thinks fit.

The words 'on hearing a winding up petition' cover the whole period from the time of admitting the petition and the date of issuing of notice till an actual order is passed.

The court cannot refuse to make a winding up order simply because the whole of the assets are mortgaged or there are no assets at all.

The court can refuse to pass an order of winding up, if the court thinks so, on a petition presented on just and equitable grounds.

Similarly, the court can direct the company to hold the statutory meeting or deliver the Statutory Report by granting reasonable time, if the pension for winding up is tiled on the ground of default of such things.

(v) Notification by the court: Before passing a winding up order, the court notifies all the creditors and contributors of the company intimating the winding up petition held and the date of its hearing on it. The court also invites

all concerned to be present at the bearing and present their cases, in any, for or against the pennon.

(vi) Appointment of Official Liquidator : After the hearing, if the court is of me opinion that the company has to be wound up, it passes the order of winding up by appointing me Official Liquidator for the purpose. The court also intimates such orders both to the Official Liquidator and the Registrar (Sec. 444).

(vii) Copy of Winding up order to be filed with Registrar (Sec, 445): After gelling the order of winning up passed by the court, the petitioner as well us the company should file with the Registrar a certified copy of the order within 30 days from the dale of passing such order.

On the being of such copy, the Registrar after making note of the same in his books relating to the company, notifies in the Official Gazette about the passing of the order of winding up.

(viii) Official Liquidator to be liquidator (Sec. 449): By virtue of his office, the Official liquidator becomes the liquidator of the company on which such winding up order is passed by the court on petition. He conducts the proceedings, of winding up. He becomes the custodian of company's properties and records.

(ix) Statement of Affairs to be furnished (Sec. 454): The company is bound to submit a statement of affairs of its assets and liabilities to the Official Liquidator within 21 days from the date of passing the order of winding up or the appointment of the Official Liquidator as the liquidator of the company.

(x) Submission of Preliminary Report: (Sec. 455): On receipt of the statement of Affairs, the Official Liquidator has to submit a preliminary report (within 6 months from the dale of the winding up order) relating to the share capital, assets and liabilities of the company, along with his comments.

If necessary, he may make an additional report stating the manner in which the company was promoted or formed, fraud, if any, committed at the time of promotion or formation, and so on.

(xi) Meetings of Creditors and Contributories : To ascertain the views of the contributories (members) as well as creditors of the company, the Official Liquidator may convene their respective general meetings separately.

(xii) Keeping Proper Books: (Sec. 461) : The Liquidator has to keep proper books for making entries of the minutes of afore-said meetings (recording the proceedings of winding up) and such other matters as may be prescribed by the court.

(xiii) Audit of Accounts : (Sec. 462) : The Liquidator has to submit to the court an account of Receipts and payments on the course of liquidation, at least twice in each year during his tenure of office. The accounts should be in the prescribed form and are subject to audit.

(xiv) Appointment of Committee of Inspection: (Sec. 464}: To assist the Liquidator, the Court may give direction to appoint a committee of Inspection. (A details discussion on this is given subsequently).

(xv) Final Report: After completing the winding up proceedings, the liquidator presents a Goal statement of accounts to the court stating the manner in which the affairs of the company was conducted, its assets realized and liabilities paid.

Committee of Inspection

In the case of compulsory winding up, a 'committee of Inspection' is appointed to assist the Official Liquidator and to represent and safeguard the interest of the creditors as well as the contributories (members).

(a) Appointment and Composition of the Committee (Sec. 464): The committee of Inspection is appointed at the direction of the court. Such direction is given by the court either at the time of passing the winding up order or at any time after the order.

On receipt of such direction from the court, the liquidator has to constitute a committee of inspection to assist him in the liquidation process. Within two months after receiving the direction from the court, the liquidator convenes the meeting of the creditors of the company for deciding the membership of the committee. He has to call the meeting of the contributories within 14 days from the date of creditors' meeting to consider the decisions of the creditors with regard to the membership of the committee. The contributories may or may not accept the decision of the creditors or may modify the same. In the case of rejection of the decision of the creditors by the contributories, liquidator seeks the direct not of the court as to the composition of the members of the committee.

Membership: Sec. 465 provides for the maximum number of membership an Inspection Committee as 12, comprising of the representatives of both creditors and contributories at agreed proportions.

Right: The following are the rights of the Committee of Inspection:

(a) to inspect of the accounts of liquidator at all reasonable time.

(b) to meet and discuss with the liquidator at appointed time

(c) to hold its meeting as and when necessary.

(d) to call for any records and seek clarification on the matter.

Quorum: The quorum for the meeting of the committee is 1/3 of the total members or 2 whichever is higher. If in any meeting, quorum is not present, it can not transact business in such meeting. The committee has to act by majority of is members.

Resignation : A member of the committee, if feels so, can tender his resignation is writing and submit the same to the Liquidator. Similarly a member can be removed from membership for valid reasons.

Secretary's duties in respect of Compulsory Winding Up

The following are the duties of the company Secretary in case of Compulsory Winding Up :

[i] He has to assist the Board of Directors in drafting the petition for winding up of the company, in case, if the company itself is the petitioner.

[ii] He has to see that the copy of the winding up order passed by the court is filed with the Registrar within 30 days of passing such order.

[iii] He has to prepare the Statement of Affairs of the company in the prescribed form, duly verified by an affidavit and submit the same to the Liquidator within 21 days or any extended time, but not more than 3 months from the date of appointment of Liquidator.

[iv] He is bound to give necessary information relating to the affairs of the company when called upon by the court.

[v] He should see that every invoice, order, business letters, etc. issued by the company roust be invariably quoted the words 'Under Liquidation'.

SPECIMEN RESOLUTIONS

Winding up by Tribunal [Section 433] (Ordinary resolution)

"RESOLVED that pursuant to the provisions contained in section 433 of the Companies Act, 1956 and in the context of mounting losses and erosion of net worth, consent be and is hereby accorded for the company to wind up and for filing a petition before the Tribunal.

RESOLVED further that the Board of Directors of the Company be are hereby authorised to submit the petition for winding up and to do all such acts, deeds and things necessary for giving effect to the process of winding up."

Members' voluntary winding up [Section 484] (Ordinary resolution)

"RESOLVED that pursuant to the provisions contained in section 484 and other applicable provisions, if any, of the Companies Act, 1956, and article .... of the articles of association of the company, consent of the company be and is hereby accorded for the company to wind up voluntarily.

RESOLVED further that Mr. .... be and is hereby appointed as Liquidator of the Company on a remuneration of .... % of the value of assets realised by the Liquidator plus travelling and other out-of-pocket expenses incurred in connection with the performance of his duties as Official Liquidator.

RESOLVED further that the Liquidator be and is hereby authorised to —

(a) Carry on the business of the company which may be necessary for the beneficial winding up of the company;

(b) Institute or defend legal proceedings by or against the company;

(c) Sell properties of the company, execute documents and deliver title deeds in connection therewith, and utilise the funds for settlement with creditors and distribution to shareholders;

(d) Raise funds from debtors and collect all dues;

(e) Do all such acts, deeds and things necessary for the purpose of winding up and exercise such other powers vested with him by virtue of section 457 of the Companies Act, 1956."

Review questions

1. What is Compulsory winding up of Companies? State the various grounds for winding up of Companies.
2. What do you mean by 'Committee of Inspection'?
3. Draft the statutory format of the 'Statement of Affairs to be submitted to the Official Liquidator.
4. Describe the duties of Company Secretary regarding compulsory winding up of Companies.
5. What are the duties of the Secretary in respect of:

   [i] Creditors' Voluntary Winding Up: and

   [ii] Compulsory Winding Up.

MODEL QUESTION PAPER

Paper 3.5: COMPANY SECRETARIAL PRACTICE

Time: 3 Hrs. Max. Marks: 100

PART-A (5 x 8 = 40 marks)

Answer any **Five** questions only.

1. Explain the nature and the duties of the secretary in connection with company promotion.
2. Detail the procedure for obtaining certificate of commencement of business
   a. of a company which has not issued a prospectus
   b. of a company which has issued a prospectus
3. Explain the duties of the secretary in connection with Board Meetings.
4. State the procedure for re-issue of Share Certificates
5. What is Transmission of Shares ? Distinction between transfer and transmission of shares.
6. Who is a Nominee director ? How is he appointed?
7. How is the first auditor of a company appointed?
8. What is a compliance certificate? State its requirements.

PART-B (4 x 15 = 60 marks)

Answer any **Four** questions only.

9. What is meant by Articles of Association? How can Articles of Association be altered? State the restrictions on the alteration of Articles of Association.
10. A company proposes to offer shares for subscription by the public. Describe the secretarial work relating to the above matter. Give a specimen resolution of allotment of shares.
11. What are the Duties of Secretary regarding transfer of shares under electronic mode?
12. Explain the secretarial practice for appointment of director other than a retiring director.
13. Enumerate the secretarial duties with regard to circulation and filing of annual accounts of a company.
14. Describe the secretarial procedure relating to holding of AGMs?
15. What are the duties of the Secretary in respect of:

    [i] Creditors' Voluntary Winding Up: and

    [ii] Compulsory Winding Up.

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